

Volume 27

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

UNITED STATES OF AMERICA, )  
                                  )  
Plaintiff,                    )  
                                  )  
VS.                            )                                    NO. CR 16-00462 CRB  
                                  )  
                                  )  
SUSHOVAN TAREQUE HUSSAIN, )  
                                  )  
                                  )  
Defendant.                    )  
                                  )  
\_\_\_\_\_

San Francisco, California  
Thursday, April 19, 2018

TRANSCRIPT OF PROCEEDINGS

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Official Reporter

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9:34 A.m.

2 P R O C E E D I N G S

3 ---000---

4 (Proceedings were heard out of presence of the jury:)

5 **THE COURT:** Okay. Let the record show -- be seated --  
6 that all parties are present. Of course the jury is not  
7 present.8 There are two things I wanted to deal with -- maybe  
9 they're more. I don't know. Obviously a discussion -- oh, I  
10 see, Cody, they gave you a prominent seat here.11 **MR. GRAY:** Moving up in the world, Your Honor.12 **THE COURT:** Right there. Right there. You couldn't  
13 get any closer.14 So I want to deal with the offer of proof and then I want  
15 to deal with jury instructions and some discussion about  
16 argument.17 So I have in mind the submission that was filed by  
18 Mr. Hussain on behalf of Mr. Hussain, but the Government, as I  
19 indicated, could answer orally, need not file a brief.

20 So, Mr. Leach, there you are.

21 **MR. LEACH:** Thank you very much, Your Honor.22 **THE COURT:** The most reasonable member of the  
23 prosecution team, as designated by the Defense. Okay.

24 And we have Mr. Marais --

25 **MR. LEACH:** I think I was designated a brute,

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1 Your Honor.

2                   **THE COURT:** -- who is the hero of the truth and  
3 reconciliation process that exists here in our courtroom;  
4 right?

5                   **MR. MARAIS:** I'm zero for one, Your Honor.

6                   **THE COURT:** Okay. Mr. Leach, go ahead.

7                   **MR. LEACH:** Your Honor, this is essentially a wire  
8 fraud case, and one of the elements of wire fraud is  
9 materiality. That is an objective test, whether the statements  
10 or omissions in furtherance of the scheme had a tendency to  
11 cause somebody to part with money or property.

12                  The subjective views of one victim or one employee or one  
13 service provider of the victim, particularly one with tens of  
14 thousands of employees, simply is not the test.

15                  The folks in the due diligence here -- Sarin, Johnson,  
16 Apotheker and Robison -- the claim is that these folks did not  
17 care about Autonomy's false financial statements or the nature  
18 and extent of Autonomy's pure hardware sales.

19                  And the proffered evidence from the defense in their offer  
20 of proof, particularly the exhibits that the Court has  
21 identified in its order inviting oral argument, are not  
22 relevant to the element of materiality, and to the extent they  
23 have some marginal relevance, the probative value of those  
24 exhibits is vastly outweighed by the 403 factors.

25                  And it would result in a mini trial, dissecting the

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1 year-long chain of events after HP acquired Autonomy, going  
2 into what employee learned exactly what at what time, what that  
3 person's role was at the time, what that person had to do with  
4 the diligence, what Hussain and Chamberlain said in response to  
5 them, and ultimately why, in a public company with thousands of  
6 employees and a host of differing motivations, that person  
7 didn't immediately accuse Dr. Lynch and Mr. Hussain in the UK  
8 with a massive fraud in the context of a public company, in the  
9 context of an organization who had recently lost its CEO, and  
10 it just results in a mini trial about why they didn't act  
11 sooner. It's not relevant and it's appropriately excluded  
12 under 403.

13 With respect to some of the individual E&Y documents,  
14 those purport to show that -- and first you need to understand  
15 E&Y's role in this.

16 E&Y was not involved in the diligence. They were not  
17 involved in the diligence. They learned about the acquisition  
18 maybe a day or two before. They were HP's auditors. They  
19 never talked to Hussain, they never talked to Dr. Lynch in  
20 connection with the diligence, and they're not in a position to  
21 say what was or was not material to anybody in the context of  
22 making the decision to acquire Autonomy.

23 Now, it's undisputed that once Autonomy is bought by HP,  
24 HP gets access to the books. That happens in every  
25 acquisition, and as the Court has remarked, that's not a

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1 remarkable proposition.

2 And in the course of E&Y doing its audit of HP's financial  
3 statements, they get access to the Deloitte work papers. They  
4 see a hundred million dollars in hardware sales. They don't  
5 know whether that was or wasn't disclosed in the diligence, but  
6 what they do know is they have to conduct an audit going  
7 forward. And they put that issue in a 50- to 75-page  
8 PowerPoint as one of many, many, many items to be considered in  
9 connection with HP's audit of Autonomy, and it just doesn't go  
10 to show -- and that PowerPoint goes to Cathie Lesjak. Others  
11 within the finance department get bits and pieces, but the  
12 context matters. Do they know about the appliance sales? What  
13 are they looking for here? And then it just raises a whole  
14 host of questions about -- that the Court has identified of why  
15 in the context of a public company what do they know, what did  
16 they learn in the diligence. It really has very little to show  
17 about whether the statements that the defendant made were  
18 material.

19 So the Court has identified -- and I can go through  
20 exhibit by exhibit, but I put them into three buckets.

21 One is the evidence of E&Y learning about the hardware  
22 sales and escalating it to Cathie Lesjak and others. That's  
23 precisely the type of "why the dog didn't bark" evidence that  
24 the Court was alluding to yesterday.

25 The second category of documents are an email to Manish

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1 Sarin in November of 2011. I think it's Exhibit 2451. And the  
2 Defense loves this exhibit because there are individuals within  
3 HP who are attempting to do something called "purchase price  
4 accounting," which is not how do we -- what price do we decide  
5 to pay for Autonomy, what do we think is -- matters in terms of  
6 making an offer to buy Autonomy. They're essentially taking  
7 the price that was agreed to, \$11.7 billion, and putting it  
8 into various buckets.

9 You have the tangible assets, which are tangible.  
10 Everybody knows what they are; the intangible assets, which are  
11 a little harder to value; and anything that doesn't go into  
12 those two buckets goes into goodwill, and it adds up to  
13 \$11.7 billion.

14 And Manish Sarin gets an email from the purchase price  
15 accounting folks who had a marginal, if no role, in the  
16 diligence that says hardware sales won't affect this purchase  
17 price evaluation. It is deeply misleading in the context of  
18 this case where the question is what was told to the due  
19 diligence team and what was told to the market and whether  
20 those statements mattered, and Manish Sarin's reaction to it  
21 which they did get into with Manish Sarin was telling. He  
22 said, "I thought they were wrong. I couldn't believe it. I  
23 didn't think what they were saying was right. And I didn't cry  
24 foul then because I just thought they were wrong."

25 And they got into that. And that's what Sarin has

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1 testified, and they have had a chance to cross-examine him on  
2 that point, and I think this illustrates there are lots of  
3 complicated reasons why different people with different roles,  
4 with different knowledges, with different quanta of information  
5 about what they're learning -- is it an amount of hardware  
6 sales, is it appliance, is it the Deloitte work papers which  
7 don't of themselves reveal a fraud because Deloitte was lied  
8 to, and so it's wholly unremarkable that Ernst & Young would  
9 look at the work papers in November of 2011 and essentially  
10 read what Deloitte had been told and say "these are the audit  
11 issues that we have to look at going forward."

12 Another category that they have is Andy Gersh. Andy  
13 Gersh, you will recall, worked at KPMG, testified under oath he  
14 didn't know about the nature and extent of the hardware sales.  
15 He continues to do work on behalf of HP. He learns in what's  
16 called the closing balance sheet or the opening balance sheet  
17 for Autonomy review -- in the course of that, he learns about  
18 the hardware sales. He learns about the size. And he would  
19 testify, if we had gotten into it, "I was shocked. I felt like  
20 the information we had gotten in the diligence was wrong and  
21 that something was amiss here." And that he escalated it to  
22 people and that he continued to try to get an answer to this  
23 all the way through June -- or January because he recognized  
24 its importance.

25 And, again, it's the context, it's the -- what the

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1 person's role in the diligence was, what the quantum of  
2 information was, and how it is they're getting that.

3 Mr. Gersh would also say he tried to get answers from  
4 Steve Chamberlain and Chamberlain was evasive in trying to  
5 answer his questions.

6 So it also opens up a whole nother array of what the  
7 Autonomy folks are saying and providing in response to all of  
8 this.

9 The final two documents that the Court identified -- and I  
10 don't have the exhibits in my notes -- are from December of  
11 2012, a year after the acquisition was announced. They are  
12 Ernst & Young documents relating to the impairment.

13 The impairment has nothing to do with this case. It is a  
14 one-year-later judgment by HP based on the information it knows  
15 then about the future value of Autonomy, and if it's less than  
16 what they paid for, they have to record a charge. And I just  
17 don't see how it has anything to do with learning about the  
18 hardware sales --

19 **THE COURT:** Well, it has something to do with the  
20 case. I mean -- but let me -- let me tell you what I  
21 understand it has to do with the case.

22 Number one, it doesn't have to do with the case, as far as  
23 the Court is concerned, is whether the impairment was improper  
24 or not or the extent of the impairment. I don't know about the  
25 extent. I have to think about that for a minute.

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1           But -- but what was significant, as it was presented to  
2 the Court or as the Court recollects, was that it -- the  
3 announcement of the impairment had an impact on -- on the  
4 individual who testified as to a member of the public, I think.  
5 I don't quite remember what he did. But he sold his shares. I  
6 think that's what happened.

7           **MR. LEACH:** That's correct.

8           **THE COURT:** So it was the event of the impairment, not  
9 the degree -- not the correctness of the impairment that --  
10 that had some impact. And that's what I thought -- I thought  
11 that that was what -- what the -- what the relevance of the  
12 evidence was.

13           But I'll -- was it more than that or less than that or  
14 what? I mean, you offered it. The Government offered it, so  
15 what did you offer it for? Because I understood, as I've  
16 just -- as I've just set forth on the record -- that was my  
17 understanding of it. Now, was it offered for some other  
18 purpose or what?

19           **MR. LEACH:** I think it was offered just to fix the  
20 date when Mr. Upton sold his shares and to quantify his loss --

21           **THE COURT:** But that would be -- that would be easy.  
22 There is a record that says "on X date" -- "X date I sold my  
23 shares." By the way, they wouldn't dispute it at all. They're  
24 not saying he didn't sell it on X date. And it wasn't, "Oh,  
25 how do you remember that date?"

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1 I mean, yes, but how he remembers that date is only  
2 relevant because it had -- because that's why he did what he  
3 did.

4 But it wasn't introduced -- I thought -- you know, look,  
5 the trial has gone on for three months so I don't know to what  
6 extent I gave a cautionary instruction or so forth -- and, by  
7 the way, I'm not precluded from commenting on any bit of  
8 evidence if it's warranted in my instructions. If it's  
9 warranted, I'll do it.

10 But my recollection is that it was to -- it was sort of  
11 the pure case of how did it -- how did it affect the listener,  
12 how did it affect the doer. It went to the -- it explained the  
13 witness' action in selling it, but are you saying no, that's  
14 not why it was introduced?

15 **MR. LEACH:** Mr. Reeves is reminding me it was -- we  
16 asked the question "when you sold" and it was the witness who  
17 said "I sold on the day the impairment was announced." It was  
18 not our intention --

19 **THE COURT:** I see.

20 **MR. LEACH:** -- to get into that level of detail.

21 If the Court thinks an instruction is appropriate --

22 **THE COURT:** Maybe I should.

23 **MR. LEACH:** -- the only relevance is to establish his  
24 state of mind to when he's selling. We are fine with that.

25 We avoided getting into the amount of the impairment. We

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1 don't think it is relevant. We think it is different from the  
2 restatement. It has nothing to do with what -- what was told  
3 to HP during the diligence and --

4 **THE COURT:** Well, I think then if I didn't give a  
5 cautionary instruction, I'm inclined to do so in my -- in my  
6 jury instructions.

7 "Ladies and gentlemen of the jury, you've heard evidence  
8 that there was a -- an event called an impairment, which means  
9 that Hewlett-Packard believed that the value of the asset which  
10 they carried on their books and records was less than  
11 originally stated. You are not to consider that for the truth  
12 of matter; that is, it was less, but only that it -- that the  
13 fact of the impairment may have, if you believe the witness,  
14 had an impact on -- on that witness' action."

15 **MR. KEKER:** Your Honor --

16 **THE COURT:** Let me -- one thing at a time.

17 **MR. KEKER:** We object to that.

18 **THE COURT:** I just want to finish it.

19 This is -- a lot of this is to make sure that there is a  
20 clear -- whichever way I come out, I want there to be a clear,  
21 unambiguous record of what I've done and why I've done it, and  
22 so in the event -- and I have no idea, but in the event there  
23 is an appeal in this case, the Defense will have the advantage  
24 or opportunity to present -- and both sides will, to have a  
25 clear record of -- you know a judge can be right, a judge can

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1 be wrong, but I want -- I want an appellate court to be able at  
2 least to have the benefit of -- to the extent I can bring  
3 clarity to the situation, which is always more of an  
4 aspirational goal than an experience, I want to be able to do  
5 so.

6 So I just feel we have the whole morning and let's just  
7 take our time. I'll hear everybody until they're finished  
8 talking to their satisfaction on these issues.

9 So I go back to you, Mr. Leach. And then I want you to --  
10 I want you to say whatever you need to say about it. But  
11 that's a possibility, and I'll explore that with the Defense.

12 **MR. LEACH:** I think that's a fair summary of the  
13 Government's position with respect to these particular  
14 exhibits. If the Court has further questions --

15 **THE COURT:** Why don't you talk to Mr. Frentzen. I  
16 think he wants to say something.

17 **MR. LEACH:** Mr. Frentzen is reminding me they put in  
18 the impairment through Yelland. The fact is in the record.  
19 They put in the press releases. We're not moving to strike  
20 them at this point, but if it's the fact of the impairment they  
21 want, they've got it.

22 I don't see any need to go further into Ernst & Young's  
23 descriptions about the impairment and the reasons and -- or  
24 understanding of the reasons in the context of a year and a  
25 half after the acquisition.

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1           But we don't think the impairment is relevant. We didn't  
2 intend to put it into evidence. It came out through the one  
3 witness. I think they have what they need to make their  
4 arguments. I don't see the relevance of the particular exhibit  
5 that they've --

6           **THE COURT:** So you're not asking for that instruction?  
7 So maybe I should turn now to Mr. Marais. Are you finished?

8           **MR. LEACH:** Yes, Your Honor.

9           **THE COURT:** Okay. Don't stray too far.

10          Let me address the last thing first.

11          **MR. MARAIS:** Sure.

12          **THE COURT:** Do you want such an instruction?

13          **MR. MARAIS:** No.

14          **THE COURT:** Okay. All right. "No" is "no." You  
15 don't have to say anything more.

16          **MR. MARAIS:** Well, Your Honor, I do --

17          **THE COURT:** You don't have to say anything more on  
18 that issue. Obviously you have a lot to say, but you don't  
19 have to explain why you do want it or don't -- I mean, why you  
20 don't want it. If you don't want it, the Government doesn't  
21 want to it, and the Court is not inclined to give it.

22          So moving ahead.

23          **MR. MARAIS:** Thank you, Your Honor.

24          Mr. Leach acts as if there has been no evidence in this  
25 trial by HP witnesses about how they felt or how they reacted.

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1 I have lost count of the number of times witnesses have been  
2 asked "Would you have been surprised if I represented these  
3 facts to you? Would you have been shocked?"

4 Mr. Sarin took the stand and said he would have been  
5 shocked to learn that Autonomy was selling hardware. And given  
6 that this isn't some invisible objective party, given that the  
7 Government has brought HP witness after HP witness in here to  
8 testify about how they would have reacted, the defense should  
9 be afforded an opportunity to clarify how in fact HP did react.

10 Chris Yelland was on the stand for a day --

11 **THE COURT:** Yeah, but -- I'm going to engage in a  
12 back-and-forth with you.

13 The issue is when we asked how would HP react, it turns on  
14 the question of would they have -- would they have purchased  
15 Autonomy? Would -- or Autonomy at that price.

16 Now, that's the question. After having purchased  
17 Autonomy, it's not like, "Oh, let's -- let's -- let's -- hey,  
18 restitution. Give it back. Let's undo the deal. No problem  
19 at all." That's not -- that was not a -- as I understand it,  
20 a -- a legal, viable opportunity that the parties had to simply  
21 just say the Roseanne Roseannadanna, you know, approach to it.  
22 You know, "Never mind. Let's just go back to day one."  
23 That -- that wasn't a viable option.

24 They had acquired it, announced it, the market had relied  
25 on it, and now the question was what are they going to do with

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1 it? And what do they know about it?

2 And that's why I find everything that -- that has been  
3 proffered by you sort of by the by. In other words, it is --  
4 it is -- I'm not saying it didn't happen and I'm not saying it  
5 wasn't significant to how it was treated in an ongoing basis.  
6 I'm just saying that its relevance, if it is relevant, is  
7 marginally relevant and introduces a host of issues.

8 For example, let's say -- and I'm reminded of the  
9 Winklevoss case where the Winklevoss twins acquired -- or they  
10 sort of settled something with -- with Facebook, and this was  
11 in a Ninth Circuit case. And it turned out that the shares  
12 that they got in exchange for release of their claims was far  
13 more valuable, far more valuable than -- in a settlement than  
14 it was -- than they had anticipated, than anybody had  
15 anticipated.

16 But the question wasn't did they get a better settlement  
17 than they thought they had gotten. The question was whether  
18 they were properly -- whether facts were properly disclosed at  
19 the time that they had entered into the settlement.

20 And in a sense -- and I know there are differences and I'm  
21 not -- you know, I'm just reaching out to what is operating in  
22 my mind at the time -- at this time, and I'm just saying -- I'm  
23 just saying to you that settlements -- purchases and so forth  
24 can turn out very, very differently, and it can then be a  
25 question of accommodation, how you're going to integrate

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1 something. There are a whole host of issues. And it doesn't  
2 affect the basic fraud, if there was a basic fraud, is what I'm  
3 saying.

4 Now, I thought your point was, look, it wasn't really  
5 material.

6 **MR. MARAIS:** Well, certainly that is one -- that is  
7 one of my points, Your Honor, and I'm happy to address exactly  
8 this question.

9 If I could hand this exhibit up --

10 **THE COURT:** Sure.

11 **MR. MARAIS:** I think I omitted this from the offer of  
12 proof, but we have given a copy of this to the Government so  
13 they are aware of it.

14 **THE COURT:** This is -- this is -- it's the Exhibit No.  
15 8228.

16 **MR. MARAIS:** Yes, sir. This is a report prepared by  
17 Ernst & Young, one of the reports that Mr. Leach was just  
18 discussing, in January 2013. This is 15 months after the  
19 acquisition closed.

20 And if I could direct Your Honor to page 18 of the  
21 exhibit, which is page 16 of the report, and I think the  
22 question you just asked is whether any of this information  
23 would have impacted the decision to purchase. E&Y writes in  
24 this report, "Given the wide range of valuations" --

25 **THE COURT:** Where -- let me just follow. What

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1 paragraph?

2                   **MR. MARAIS:** Towards the bottom where the flag is,  
3 Your Honor.

4                   **THE COURT:** Okay. Okay. Go ahead.

5                   **MR. MARAIS:** "Given the wide range of valuations at  
6 the time of the acquisition, the \$300 million change in  
7 valuation is not expected to have altered the company's  
8 purchasing decision or the overall amount paid."

9                   And then skipping a sentence, they go on, "The timing  
10 adjustments only impact the timing of the recognition of  
11 revenue, not the timing of cash flows, and the hardware  
12 transactions have no impact on the overall cash flows as they  
13 were accounted for as gross instead of net."

14                   These are HP's auditors 15 months after HP had full access  
15 to Autonomy's books saying that the alleged fraud that HP has  
16 now uncovered would have no impact on the company's purchasing  
17 decision or the overall amount paid.

18                   This is evidence of whether or not any of these  
19 allegations were material to Hewlett-Packard, Your Honor.

20                   **THE COURT:** Material what? Do you mean material in  
21 the acquisition?

22                   **MR. MARAIS:** Correct. Material to its valuations or  
23 the decision to proceed with the deal and the price that it  
24 paid.

25                   **MR. LEACH:** This is Ernst & Young, Your Honor, not HP.

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1 This is Ernst & Young 15 months later talking about whether or  
2 not we should have taken an impairment charge earlier than the  
3 impairment charge that they took in November of 2012.

4 I believe these words are taken out of context. I believe  
5 it's based on partial information, and it's not the people who  
6 are making the decision at the time. Ernst & Young was not  
7 involved in the diligence.

8 Ernst & Young -- the question it's trying to analyze right  
9 here is whether the impairment charge in November of 2012 --  
10 "whether our current valuation of this based on what we think  
11 this company is going to do over the lifetime of the company is  
12 less or more than the purchase price." That's what Ernst &  
13 Young is talking about here.

14 **THE COURT:** Why doesn't -- I mean, again, going back  
15 to my stock analogy, I buy stock or I buy X or I buy Y and it's  
16 represented to be -- it's represented that it will be this  
17 particular value. And then I get it and -- and circumstances  
18 change and it turns out I bought something different from what  
19 it was represented to be, but it turns out to be more valuable  
20 than I originally anticipated.

21 Question: Did a fraud occur? Because I think the answer  
22 is yeah.

23 **MR. LEACH:** Yes.

24 **THE COURT:** Question: What are my damages? Oh, zero.  
25 My damages may be zero. As a matter of fact, maybe I should

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1 give it back.

2       But putting that aside, that's a question, I think, of  
3 damages, not of whether or not the transaction would have gone  
4 forward at the time -- at the time the transaction was  
5 anticipated.

6       Sure, a year or two later your asset may turn out to be  
7 more valuable rather than less valuable through any variety of  
8 circumstances: Changes in the market, changes in -- in laws,  
9 changes in tax laws, changes in -- in demand, changes -- all  
10 sorts of things can happen in a market, in a business,  
11 especially the size of Hewlett-Packard that makes an asset more  
12 or less valuable.

13       As a matter of fact, Mr. Marais, you are arguing that  
14 case. You are saying that what happened in this case was that  
15 Hewlett-Packard destroyed the value of the asset. That's --  
16 that's -- I've heard that nonstop. And maybe they did. Maybe  
17 they destroyed it. But that doesn't mean that they weren't --  
18 if proven, they weren't lied to and misrepresented as to  
19 what -- what the past was, past or present, up to a particular  
20 time.

21       And that they didn't -- and there's no evidence that --  
22 well, I think that's really the point. I mean, that's the way  
23 I look at it. And that became more valuable, less valuable.  
24 All these activities certainly could have some bearing, and I'm  
25 not saying it doesn't. I'm just saying that under -- under

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1 403 -- did I get that right? I always get that wrong. 403,  
2 that is the sideshow. That is the -- that is the -- that's --  
3 that's exactly what is meant by keeping it out, I think. I  
4 mean, I think it meets almost all of the criteria under 403.

5 **MR. MARAIS:** Your Honor, I think we need to add just a  
6 touch of nuance to the hypothetical.

7 If you had bought the stock and the Government brought you  
8 in and asked you questions about why you bought that stock, and  
9 you said, "Mr. Keker told me it was a great deal, that was the  
10 reason I bought the stock based on that representation," if it  
11 turns out that there are emails exchanged after the fact in  
12 which you say "I bought this stock, I would have bought it  
13 irrespective of any representations Mr. Keker made, I knew  
14 Mr. Keker was wrong at the time" --

15 **THE COURT:** By the way, if you have a witness who will  
16 come in and say, "Oh, by the way, even though these things  
17 happened, we would have bought it anyway" --

18 **MR. MARAIS:** Well, Your Honor, that's exactly what  
19 Exhibit 8228 says.

20 **THE COURT:** No, it doesn't say that. It says that --  
21 it says that the asset is as valuable -- it says -- it  
22 discusses the impairment.

23 But that, by the way -- that's Ernst & Young. I need a  
24 Hewlett-Packard person or somebody who participated in the  
25 transaction who would have said -- and you have had plenty of

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1 opportunity to say to the due diligence people who were -- and  
2 Mr. Apotheker, which -- to say "Look, would you have bought it  
3 anyway? If you had known the things that were -- the truth  
4 of" -- I'll call it the truth of the matter, without  
5 characterizing it necessarily as true, but, I mean, "If you had  
6 known the truth of the matter as depicted by the Government or  
7 if you had known what the Government says is the truth of the  
8 matter, would you have bought it anyway?" "No."

9 Is there a witness who would have said who was in  
10 connection with the decision-making process "I would have  
11 bought it anyway?" Even then, I'm not all that comfortable that  
12 that comes in, but at least that's the kind of evidence --

13 **MR. MARAIS:** Your Honor --

14 **THE COURT:** -- that I think you would have to proffer  
15 to me in terms of materiality. That somebody came along. They  
16 hired -- their accounts or whoever Ernst & Young -- they were  
17 Hewlett-Packard's accountants, saying "Oh, look, don't" -- you  
18 know, "it's just as valuable as initially represented" and so  
19 forth, isn't the kind of evidence.

20 Now, what you want to do, fair enough, is say "well, since  
21 they said that, isn't it a reasonable inference that they would  
22 have bought it anyway." And the answer is not necessarily. I  
23 don't know. It has to be put in a whole context of what they  
24 were doing, what was going on, what was happening.

25 And as to that, that's the sideshow, you see. That's --

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1 that's the thing that I think 403 is designed to keep out, in  
2 the Court's view.

3 **MR. MARAIS:** Your Honor, when Mr. Sarin was here, one  
4 of the lines of questions I had hoped to explore was the  
5 November 2011 email that Mr. Leach has referenced. It's  
6 Exhibit 2451. We had a sidebar about it after Mr. Sarin  
7 himself mentioned it, and I was instructed not to discuss it.  
8 Mr. Reeves objected when I got anywhere near this email.

9 This is an email from Mr. Sarin in the wake of the close  
10 of the deal in which he is informed of \$100 million worth of  
11 revenue sales, and his response is, in part, "I suspect this is  
12 sell-through revenue where they are getting a margin as they  
13 sell Dell appliances."

14 Now, Mr. Leach will stand here and say he was mistaken, he  
15 didn't mean what these words on the page appear to say, but we  
16 were not allowed to ask him questions about it, and -- and  
17 Mr. Sarin testified at some length that he had no idea about  
18 the hardware sales, that he would have been shocked to learn  
19 about the hardware sales. Emails exchanged six weeks later  
20 suggest that he was well aware that these were pass-through  
21 revenues.

22 **THE COURT:** Mr. Leach?

23 **MR. LEACH:** They asked him about the email,  
24 Your Honor. They asked the question, "Isn't it true you went  
25 to Dr. Lynch for a job after learning about the hundred million

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1 in hardware sales?"

2 Mr. Sarin testified about this. He said, "No." He said,  
3 "I recall an email from Catherine Harvey. They were talking  
4 about valuations. I thought her number was wrong. And as I  
5 sit here today, I" --

6 **THE COURT:** I thought that's what his answer was.

7 Let me ask you another question, if I might.

8 Do you have an Ernst & Young witness who will come in  
9 and -- and -- and say that the hardware sales in -- didn't  
10 affect the decision as to whether to acquire the company? Do  
11 you have that person?

12 **MR. MARAIS:** Well, Your Honor, yes, we have -- I don't  
13 know exactly what Kevin Asher would say until he takes the  
14 stand, but he is under subpoena, and we have a series of  
15 documents that we've submitted in which Ernst & Young explains  
16 that because the valuation was based on a discounted cash flow  
17 analysis and the hardware sales have no bearing on the cash  
18 flow, because of those facts, the hardware sales wouldn't have  
19 affected HP's valuation of the company.

20 So I don't know what Mr. Asher will say, but, yes, there  
21 is a witness and certainly there are exhibits.

22 **MR. LEACH:** Mr. Asher was not involved in the due  
23 diligence, Your Honor. He was not involved in the decision to  
24 buy Autonomy. They have 302s from Kevin Asher. They have  
25 Morgan Lewis -- or Proskauer Rose interviews from Mr. Asher

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1 where he will say "The hardware sales seemed unusual to me. I  
2 questioned the accounting when I saw them. I elevated them to  
3 HP." But he will not say that it did not affect HP's decision  
4 to purchase Autonomy. He just won't say that.

5 **THE COURT:** I don't think -- I mean, you're not  
6 representing he'd say that?

7 **MR. MARAIS:** Your Honor, I'm representing that there  
8 are documents that say that. I haven't spoken to Mr. Asher.

9 **THE COURT:** You are representing that there are  
10 documents which say that a year and a half or so forth or  
11 whenever Ernst & Young did it, that in their view, the  
12 valuations are a particular thing. That's what you are saying.

13 **MR. MARAIS:** A year and a half after HP had full  
14 access to information --

15 **THE COURT:** Oh, yeah. There is no question about the  
16 access.

17 By the way, I would certainly expect a stipulation by the  
18 Government that as of October, whatever date it was, all the  
19 books and records, including the Deloitte work papers, if true,  
20 were made available to -- to Hewlett-Packard. Isn't that  
21 correct?

22 **MR. LEACH:** I think it's correct that they had access  
23 to them, Your Honor. I pause on the words "made available."  
24 It's not like there is a hand off --

25 **THE COURT:** Okay. But I think that that -- that ought

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1 to be -- that's easy enough to get into evidence. I think  
2 that -- that point -- so if the Defense wants to argue they had  
3 the papers right there as of a particular date, they can --  
4 their -- it's in the record they had it there. That's all that  
5 one would expect out of a stipulation.

6 **MR. MARAIS:** Your Honor, one of the first documents  
7 that we moved to admit into evidence was Exhibit 6463, which is  
8 an email from approximately one week after the close, in which  
9 Autonomy is transmitting its trial balances to KPMG, and KPMG  
10 passes those trial balances on to HP. If you expect that the  
11 Government would stipulate to that, I see no reason why that  
12 document shouldn't come into evidence.

13 And on a similar note, Your Honor, Exhibit 2451 is this  
14 Manish Sarin/Catherine Harvey email that Mr. Leach said I asked  
15 Mr. Sarin questions about. We've also asked that that exhibit  
16 be moved into evidence.

17 **THE COURT:** Well, okay. I don't know where we are on  
18 that issue.

19 **MR. LEACH:** We oppose. It raises exactly the type of  
20 "why didn't you act sooner" or "why you didn't something more"  
21 type inquiry that the Court identified yesterday and that we've  
22 been talking about all this morning.

23 It certainly shouldn't come into evidence, and if it is  
24 going to come into evidence, we need Manish Sarin back here to  
25 give his explanation of it.

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1           But we oppose that.

2           **THE COURT:** Mr. Marais, if I were to allow this into  
3 evidence, the Ernst & Young and so forth, would you concede  
4 that the Government then is entitled to bring in any evidence  
5 that they have to establish, one, that Ernst & Young wasn't  
6 involved in the acquisition and that the decisions that were  
7 made at a particular time did not involve the analysis that  
8 Ernst & Young had -- had prepared?

9           Two, that between the time that Ernst & Young had  
10 conducted their analysis and -- and the transaction had taken  
11 place, that there were a number of changes in the market, in  
12 the operation of Hewlett-Packard, in their views of -- of the  
13 business that may have contributed to their decision -- that  
14 were post -- that were post acquisition and they have  
15 influenced their decision as to whether or not they -- they  
16 would have purchased the company?

17           **MR. MARAIS:** Yeah. I think the Government should get  
18 to cross-examine a witness, Your Honor --

19           **THE COURT:** No, no, not cross-examine. I'm saying  
20 bringing in all the evidence. Bringing in witnesses to say  
21 what happened.

22           **MR. MARAIS:** Well, I don't know that you would need  
23 that many witnesses, Your Honor.

24           **THE COURT:** Oh, I think you might need a lot of  
25 witnesses from the Government's point of view. I mean, I think

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1       they would have to show how the market operated, they would  
2       have to show how do -- how does the market -- how do you deal  
3       with particular types of disclosures from a public point of  
4       view, how do you -- how do you integrate a company, what were  
5       their plans for integration.

6           There are -- I foresee, if this -- that this phase of the  
7       case would involve a great deal of -- of testimony, which, by  
8       the way, is particularly ill-suited for a jury to make some  
9       determination about. It's particularly ill-suited because it  
10       is -- because it invites tremendous speculation, tremendous  
11       speculation as to -- as to the significance of events.

12           It is -- and then, of course, I'd -- the Defense would be  
13       entitled to rebut any of the evidence that came in on these  
14       issues. You would be entitled not just to cross-examination,  
15       you would be entitled to bring in witnesses. It is exactly the  
16       sort of thing that 403 is designed to prevent.

17           Anyway, does anyone -- I'm going to take it under  
18       submission. I want to think about it a bit more. Obviously I  
19       have to come to a decision sooner rather than later, but is  
20       there anything else I need to consider before making a  
21       decision?

22           **MR. MARAIS:** Your Honor, if I could, one more -- one  
23       more category --

24           **THE COURT:** Sure.

25           **MR. MARAIS:** -- of evidence.

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1           As I mentioned a minute ago, the Government had  
2 Mr. Yelland on the stand for a day. Every word he said  
3 postdated the acquisition. I appreciate that some of that was  
4 a retrospective view of the accounts, but a lot of it wasn't.  
5 A lot of it was "What happened in May 2012? Where did you meet  
6 with Mr. Hussain? What did Mr. Hussain say about the quarterly  
7 earnings for May of 2012?"

8           **THE COURT:** That's different, by the way. I mean,  
9 that falls into a totally different category. That's the  
10 category of "what did the defendant say about what he had  
11 done," and that's generally called admissions or confessions or  
12 he so forth. That fits a totally different category.

13           That's not, oh --you know, now we're a year away or six  
14 months away or three months away, what's the present operation  
15 of it. I think that's in a different category anyway.

16           And I also think that Yelland was explaining, yes, he  
17 did -- the restatement of course was done afterwards, but he  
18 was explaining how he did it. And he was explaining the number  
19 of transactions he looked at, who looked at what, and how they  
20 came to the conclusions they came. While it happened after the  
21 acquisition, it related to what happened before the  
22 acquisition. And so that's called an autopsy or an analysis  
23 and so I -- that's in a different category.

24           **MR. MARAIS:** Your Honor, I don't dispute that aspect  
25 of the analysis at all. My point is this: There were

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1 questions about Mr. Yelland's interactions with Mr. Hussain  
2 after the close. If Mr. Hussain had quit on day one and -- and  
3 fled the company, rest assured, we would have heard about that  
4 from Mr. Yelland.

5 So evidence that shows that Mr. Hussain stayed around,  
6 that he turned all of the books and records over, that they  
7 sent the trial balances to KPMG, that they signed --

8 **THE COURT:** All of it's in.

9 **MR. MARAIS:** Your Honor, it isn't all in, and there  
10 are --

11 **THE COURT:** Well, I don't know what's not in. What's  
12 in is, number one, they have the books and records, and if it's  
13 not, I'll want to make sure it is in. And number two, I  
14 thought it's in that Mr. Hussain was there. And number three,  
15 I thought it was in that people had conversations with him, all  
16 of which, by the way, may be indications of -- of the lack of  
17 criminal intent.

18 **MR. MARAIS:** Exactly.

19 **THE COURT:** You can argue that.

20 **MR. MARAIS:** Well, Your Honor --

21 **THE COURT:** You can argue that.

22 **MR. MARAIS:** I keep coming back to Exhibit 6463, which  
23 is the transmission of the trial balances and --

24 **THE COURT:** I don't know. 6463?

25 **MR. MARAIS:** Yes, sir.

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1                   **THE COURT:** That's not the one we just talked about?

2                   **MR. MARAIS:** I have --

3                   **THE COURT:** I'll look at 6463. I don't know. I have  
4 to look at it.

5                   **MR. MARAIS:** We had separately moved to admit this  
6 exhibit because I think it falls into exactly the category that  
7 Your Honor is describing. That it demonstrates --

8                   **THE COURT:** I'll look at it. What about 6463? I just  
9 don't -- I know I asked about it. I'm going to look at it.

10                  **MR. MARAIS:** I have a copy if you would like.

11                  **MR. LEACH:** It's an email to a whole host of HP people  
12 honestly I've never heard of and who haven't --

13                  **THE COURT:** I'll look at 6463. Okay.

14                  Anything else, gentlemen?

15                  **MR. LEACH:** I just want to add one small point,  
16 Your Honor --

17                  **THE COURT:** A small point.

18                  **MR. LEACH:** A small point.

19                  You were asking wouldn't the Government want to test what  
20 Mr. Marais said in the sense of -- of after-the-fact events.  
21 We did have questions for Ms. Lesjak, Meg Whitman, Kevin Asher,  
22 the HP analyst, and I do agree it would entail a great number  
23 of witnesses on the Government's point to respond to any of  
24 that.

25                  **THE COURT:** I think it would, in fairness to what is.

## CHARGING CONFERENCE

1 Being shown -- what is proposed to be shown. Okay. Thank you  
2 very much.

3 Let me move to a second issue, the second issue being jury  
4 instructions. Okay.

5 So let me just tell you what I do that may be different  
6 from what other people do.

7 **MR. GRAY:** Sure.

8 **THE COURT:** I don't think Judge Seeborg, as an  
9 example, does this.

10 **MR. GRAY:** No.

11 **THE COURT:** No. He's not -- that's only because he's  
12 lower on the letterhead than I am.

13 But I've taken 3.8, direct and circumstantial evidence,  
14 and modified it by taking out the nearly-incomprehensible Ninth  
15 Circuit language of -- of the explanation of the difference  
16 between direct and circumstantial because it doesn't make any  
17 difference. It's hardly illuminating, and I think all I'm  
18 saying here is both kinds of evidence are entitled to whatever  
19 weight the -- the jury assigns it. Okay.

20 **MR. GRAY:** Your Honor, on that issue, just briefly, we  
21 prefer our instruction, but we understand you have ruled on  
22 that, and that's fine with us.

23 **THE COURT:** You prefer the regular Model Ninth  
24 Circuit.

25 **MR. GRAY:** That's right.

## CHARGING CONFERENCE

1                   **THE COURT:** I understand that. Well, you know, that's  
2 the way life is. Okay.

3                   So turning to -- and we'll sort of go through mine first  
4 because I want to try to make sure that I cover it.

5                   You see that I took 4.3, "other crimes, wrongs or acts of  
6 the defendant" -- by the way, I could take out the language  
7 "other crimes" because I don't know that there is any evidence  
8 of any other crime. So I can take that out of the heading --

9                   **MR. GRAY:** Your Honor --

10                  **THE COURT:** -- and say "other acts of defendant."

11                  **MR. GRAY:** Your Honor, can I be heard on this briefly?

12                  **THE COURT:** Yes.

13                  **MR. GRAY:** We actually oppose that this instruction be  
14 issued at all. The only reason we agreed to propose it in the  
15 first instance is because the Government disclosed to us in  
16 advance of trial that they were going to be offering evidence  
17 about Daud Khan and --

18                  **THE COURT:** Can I take it out?

19                  **MR. LEACH:** Yes.

20                  **THE COURT:** Out.

21                  **MR. GRAY:** Thank you.

22                  **THE COURT:** Then we go to 4.9. Okay. It says, "You  
23 have heard testimony from" -- and -- oh, this is a tag team.

24                  **MR. KANIG:** Yes, Your Honor.

25                  **THE COURT:** Oh, a tag team. Okay. Great.

## CHARGING CONFERENCE

1                   **MR. LEACH:** I'm out-numbered.

2                   **THE COURT:** I'm obviously going to give 4.9.

3                   **MR. KANIG:** Yes, Your Honor.

4                   **THE COURT:** Who are the witnesses?

5                   **MR. KANIG:** Mr. Rizek, Mr. Scott --

6                   **THE COURT:** Rizek, Scott.

7                   **MR. KANIG:** Ms Anderson.

8                   **THE COURT:** Anderson.

9                   **MR. KANIG:** Mr. Egan.

10                  **THE COURT:** Egan.

11                  **MR. KANIG:** And Mr. Steven Truitt. And Mr. Lee Welham  
12 as well.

13                  **THE COURT:** And who?

14                  **MR. KANIG:** Lee Welham.

15                  **THE COURT:** And Welham?

16                  **MR. KANIG:** Yes, Your Honor.

17                  **MR. LEACH:** May we be heard on this point, Your Honor?

18                  **THE COURT:** Yes.

19                  **MR. LEACH:** Lee Welham did not receive immunity from  
20 the Government. He did not receive any benefits. He's not an  
21 accomplice.

22                  He did enter into -- he's a foreign witness. He entered  
23 into an agreement with the Government to come here and testify.

24                  I don't think the fact that he did that warrants holding  
25 him out before the jury as somebody who they should take extra

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1 care in considering his testimony. This isn't as if he was  
2 excused from a crime or anything like that. He -- he -- not  
3 immunized at all. Never invoked the Fifth. He agreed to come  
4 to the United states to testify, nothing more. The Government  
5 hasn't conferred a benefit on him.

6 **THE COURT:** Okay. We'll get to Welham in a minute.

7 All the others --

8 **MR. LEACH:** Rizek, Scott, and Steve Truitt testified  
9 pursuant to court-ordered immunity.

10 **THE COURT:** So it's immunity.

11 **MR. LEACH:** Ms. Anderson testified pursuant to a  
12 cooperation agreement with the Government where she -- we  
13 agreed not to use the statements --

14 **THE COURT:** Okay.

15 **MR. LEACH:** -- she made, and Christopher Egan had a  
16 deferred prosecution agreement with the Government --

17 **THE COURT:** They all got benefits?

18 **MR. LEACH:** Yes.

19 **MR. KANIG:** Yes, Your Honor. We submitted last night  
20 a proposed instruction on this.

21 **THE COURT:** Have you looked at theirs?

22 **MR. LEACH:** I have looked at theirs.

23 **THE COURT:** Let's just go through theirs then.

24 **MR. LEACH:** I do have some problems with some of the  
25 language of their proposed instruction, and we object to Lee

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1 Welham being included in this list at all.

2 The Government -- does the Court have the draft in front  
3 of it?

4 **THE COURT:** Yes.

5 **MR. LEACH:** Okay.

6 First of all, it says in paragraph 1, line 4, that  
7 "Testimony was given in exchange for a promise by the  
8 Government." That's not accurate. The Government moved for  
9 court-ordered immunity and they testified pursuant to a court  
10 order, not a promise by the Government.

11 I think it's more appropriate to say that "Testimony was  
12 given pursuant to a court order that the testimony will not be  
13 used in a case against the witness."

14 We also think it would be --

15 **THE COURT:** Let me ask about that. I mean, because  
16 there is no question I ordered it. But I ordered it at the  
17 request of the Government. Wasn't there -- was -- and I  
18 don't -- I actually don't remember whether you have to go to  
19 the Attorney General and get consent.

20 **MR. LEACH:** We're required to get --

21 **THE COURT:** Okay.

22 **MR. LEACH:** -- DOJ approval.

23 **THE COURT:** So why then draw the distinction between  
24 that kind of immunity and any other kind of immunity? I mean,  
25 that gets into -- it really does get into the bureaucracy of

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1 how -- how the -- the procedure is actually --

2                   **MR. LEACH:** It is suggestive of an agreement between  
3 us --

4                   **THE COURT:** But it is.

5                   **MR. LEACH:** -- and these witnesses.

6                   **THE COURT:** But it is. It's absolutely an agreement.

7                   **MR. LEACH:** No. It's these people won't talk to us  
8 and it's compulsion. We forced them up there, Your Honor.

9                   **THE COURT:** I see.

10                  **MR. LEACH:** They were not necessarily our witnesses.

11                  **THE COURT:** I see what you're saying. So you're  
12 saying they were compelled to testify.

13                  **MR. LEACH:** Yes. We subpoenaed them. They were  
14 prepared to invoke the Fifth. We got an order compelling them  
15 to testify. That's not a promise by the Government.

16                  **THE COURT:** Well, that's a different case.

17                  **MR. KANIG:** Mr. Keker is correctly pointing out to me  
18 that these witnesses all went through an extended process of  
19 interviewing with the Government subject to proffer agreements  
20 that were identical in the use immunity nature as the ultimate  
21 compulsion order that the Court required them to testify.

22                  So it's a little bit of a bait and switch to say these  
23 witnesses were compelled to testify at the last minute when in  
24 reality they were cooperating pursuant to agreements with the  
25 Government the entire time.

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1                   **THE COURT:** I don't know that it's a bait and switch,  
2 but I think it's a mixed situation; that is to say, they --  
3 they initially were interviewed, taking Mr. Keker's point --  
4 they were initially interviewed or over a series of interviews,  
5 they said, "Sure, I'll talk to you, but I -- but I want use  
6 immunity," you know --

7                   **MR. LEACH:** Queen for a day.

8                   **THE COURT:** Queen for a day. "I don't want anything I  
9 say be used against me." And the Government says "yes,"  
10 because that's -- that's a normal prosecutorial function of how  
11 do you move ahead. You don't necessarily haul everybody in an  
12 investigation in before a judge to compel testimony. It may be  
13 the case and it always arises or frequently arises in the  
14 context of grand jury testimony.

15                  But the last thing you want, any judge wants, is a parade  
16 of witnesses who would be pleased to come in and -- and -- and  
17 talk to the Government provided that nothing they said would be  
18 used against them. Then you move to another level, which is  
19 either grand jury testimony or court testimony, and at that  
20 point -- at that point if they say to the Government, "By the  
21 way, I won't testify unless I'm given court-ordered immunity,"  
22 I think they are being compelled to testify.

23                  **MR. KANIG:** Well, first of all --

24                  **THE COURT:** Because they know they have an option.

25 Isn't the option -- couldn't they come in and say, "Well, look,

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1 as far as I'm concerned, do I have -- do I have your word that  
2 you won't -- that anything I say in my -- in the stand won't be  
3 used against me?" I don't see why the Government couldn't  
4 agree to that as well. Couldn't they? Couldn't they come in  
5 and they say, "Well, I know it's public and so forth, but  
6 here's a letter. We won't -- we won't use anything that you  
7 say against you."

8 **MR. LEACH:** We did do exactly that with Ms. Anderson,  
9 Your Honor. We have no problem with that language with respect  
10 to Ms. Anderson.

11 **MR. KANIG:** And Mr. Egan.

12 **MR. LEACH:** It's the court-ordered compulsion that we  
13 take issue with. The Court has it exactly right.

14 **MR. KANIG:** If Mr. Leach wants to give an instruction  
15 that says that these witnesses would have invoked their Fifth  
16 Amendment privilege against self-incrimination because they  
17 committed a criminal act instead of saying it's a promise from  
18 the Government --

19 **THE COURT:** By the way, they don't have to say that,  
20 do they? They don't have to say "because I committed a  
21 criminal act." What they have to say is that "I'd be placed in  
22 jeopardy and I may be prosecuted." That's the test. The test  
23 isn't whether you're guilty. The test is whether or not you  
24 are subjected to a prosecution.

25 **MR. KANIG:** Fair --

## CHARGING CONFERENCE

1                   **THE COURT:** I think what I need is a  
2 Government-proposed instruction. Did you give me one?

3                   **MR. LEACH:** I can, Your Honor. I haven't had time --

4                   **THE COURT:** Well, what are you guys doing?

5                   **MR. KANIG:** Your Honor, just to be clear,  
6 Ms. Anderson --

7                   **MR. LEACH:** I can do that later today.

8                   **MR. KANIG:** Ms. Anderson and Mr. Egan undisputedly  
9 testified pursuant to a promise from the Government. Both of  
10 those witnesses had agreements with the Government.

11                  So we're really only talking about Joel Scott and Steven  
12 Truitt right now that would fall in this different bucket, and  
13 we would propose that if we are not going to be able to say  
14 "promise," we would be able to say they were "compelled"  
15 because they would have invoked their Fifth Amendment right  
16 against self-incrimination.

17                  **THE COURT:** I think I need the dueling instruction  
18 from the Government as to what you propose and I'll -- I'll  
19 take the two and sort it out. If you want to say something  
20 about it in a couple of pages, please feel free to do that.

21                  **MR. KANIG:** Thank you, Your Honor.

22                  **THE COURT:** I don't think this is going to be that  
23 crucial to the outcome of the case, but, hey, who am I to say  
24 that? So we'll go through that and figure that one out.

25                  Opinion evidence. Who -- who is the -- did anybody

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1 testify as an expert in this case?

2 **MR. GRAY:** No, Your Honor.

3 **THE COURT:** I thought everybody was an expert in this  
4 case. So I'd have to list them all, but putting that aside,  
5 did anybody give their opinion in that -- as it's defined?

6 **MR. LEACH:** No.

7 **THE COURT:** They say no, no. It's out.

8 **MR. GRAY:** Great.

9 **THE COURT:** Hey, maybe we can get this down to like  
10 four instructions. Okay.

11 Now we have both 4.15 and 4.16 because I have, over  
12 objection, admitted a chart and summary in evidence. Okay.  
13 And I've also not admitted others.

14 And I think in argument, please be clear with the jury as  
15 to what is in evidence and what is not in evidence.

16 **MR. KEKER:** And with regard --

17 **THE COURT:** And, Mr. Keker, yes? Go ahead.

18 **MR. KEKER:** With regard to that, what we have not  
19 done, 2984 is the summary of the Top 40 and -- that we've  
20 argued about a lot. You let it in subject to a motion to  
21 strike.

22 We are now making a motion to strike, and our position is  
23 it shouldn't be in evidence.

24 **THE COURT:** Right.

25 **MR. KEKER:** It can be a demonstrative.

## CHARGING CONFERENCE

1                   **THE COURT:** Right. Denied.

2                   Okay. So I'm going to just go through it and -- my list  
3 and stop me where you want to say something. Okay?

4                   8.20, conspiracy to commit wire fraud.

5                   **MR. GRAY:** Your Honor, we prefer our version of that  
6 instruction, but we understand the Court has ruled.

7                   **THE COURT:** Okay.

8                   **MR. LEACH:** Your Honor, we have one issue with line --  
9 it's between lines 5 and 7. It says, "First beginning on or  
10 about January 2009 and ending on or about October 2011."

11                  The language of the Indictment reads, "Beginning in or  
12 about Autonomy's first quarter of 2009 beginning January 2009,  
13 the conspiracy began."

14                  That covers a three-month period that isn't captured by  
15 this instruction, and I think --

16                  **THE COURT:** Okay. Well, I have to do it in terms of  
17 what the Indictment says.

18                  **MR. LEACH:** The Indictment says "Beginning in or about  
19 Autonomy's first quarter of 2009."

20                  **THE COURT:** "Beginning in or about Autonomy's first  
21 quarter of 2009." Why isn't that January?

22                  **MR. GRAY:** Your Honor, it's not clear. Why don't we  
23 just say "January 2009 and ending on or about October 2011"?

24                  **THE COURT:** What am I not covering?

25                  **MR. LEACH:** One moment, Your Honor.

## CHARGING CONFERENCE

1                   **MR. REEVES:** We are just looking for the Indictment.

2                   **THE COURT:** Whatever the Indictment says, for the  
3 moment -- I mean, I could use the words of the Indictment, but  
4 I don't -- but I'm not so inclined to just use the words of the  
5 Indictment if they talk about quarters and so forth, unless  
6 there is a difference. If this instruction doesn't cover it,  
7 then of course I think I have to change it.

8                   But why doesn't January 2009 cover it?

9                   **MR. REEVES:** The language is right here, Bob.

10                  **MR. LEACH:** The Indictment reads, Your Honor, "In or  
11 about Autonomy's first quarter 2009, which began in January of  
12 2009."

13                  **THE COURT:** So why isn't --

14                  **MR. LEACH:** The issue I'm worried about, Your Honor,  
15 is what if the jury finds the conspiracy began in March and not  
16 January? That's what the Indictment --

17                  **THE COURT:** Okay. So what? We're not going to ask  
18 them when did the conspiracy start. But what are you concerned  
19 about? You're concerned that --

20                  **MR. LEACH:** I'm concerned reading just what the Court  
21 has written, a juror could think that if the conspiracy began  
22 in March, but not January, that this element is not satisfied.

23                  **THE COURT:** So your language is "Beginning" --  
24 again --

25                  **MR. LEACH:** -- "In or about the" --

## CHARGING CONFERENCE

1                   **THE COURT:** "In or about" --

2                   **MR. LEACH:** -- "the first quarter of 2009."

3                   **THE COURT:** "The first quarter of" -- what?

4                   **MR. LEACH:** 2009.

5                   **THE COURT:** 2009. Go ahead.

6                   **MR. LEACH:** That's what we propose.

7                   **THE COURT:** Well, that's about -- that's awful.

8                   **MR. LEACH:** Or "which began" --

9                   **THE COURT:** I mean, maybe they are all accountants.

10                  **MR. GRAY:** Your Honor --

11                  **MR. LEACH:** I'm fine with adding the clause "which  
12 began in January of 2009."

13                  **THE COURT:** Pardon?

14                  **MR. LEACH:** "Which began in January of 2009."

15                  **THE COURT:** Oh, "which began in January 2009."

16                  And is that the way the Indictment reads?

17                  **MR. LEACH:** Yes, Your Honor.

18                  **THE COURT:** Okay. Then that's what I'm going to give.

19                  **MR. GRAY:** We oppose --

20                  **THE COURT:** So I don't have listen to --

21                  **MR. KEKER:** We --

22                  **THE COURT:** Well, wait a minute. You've got a problem  
23 with my putting in this instruction the words of the  
24 Indictment?

25                  **MR. GRAY:** We prefer our version, yeah.

## CHARGING CONFERENCE

1                   **THE COURT:** Well, I think you prefer not having an  
2 Indictment.

3                   **MR. GRAY:** Sure. Let's do --

4                   **THE COURT:** Okay. But life has its disappointments  
5 and that's one of them.

6                   **MR. GRAY:** Okay. Thank you, Your Honor.

7                   **THE COURT:** Moving ahead, anything else?

8                   **MR. LEACH:** Nothing on 8.2.

9                   **THE COURT:** Okay. 8.23.

10                  **MR. LEACH:** Nothing from the Government.

11                  **MR. GRAY:** Yes, Your Honor.

12                  **THE COURT:** Okay.

13                  **MR. GRAY:** We object to this instruction being given.  
14 We think it's duplicative of the language in the conspiracy  
15 instruction.

16                  We think that if you're going to include it, you should  
17 add the additional accurate details about conspiracy law that  
18 we proposed as part of our instruction.

19                  **THE COURT:** Okay. So this is the Model Instruction  
20 8.23, "conspiracy, knowledge and association with other  
21 conspirators." I'm going to give it as indicated over your  
22 objection.

23                  **MR. GRAY:** Okay.

24                  **THE COURT:** So moving ahead, we have now 8.25.

25                  **MR. LEACH:** Nothing from the Government.

## CHARGING CONFERENCE

1                   **MR. GRAY:** Your Honor, we object to this instruction  
2 being given as well. A couple of points here.

3                   This is the *Pinkerton* instruction, Your Honor.

4                   **THE COURT:** Right.

5                   **MR. GRAY:** This isn't a drug or mafia case involving  
6 obviously criminal conduct. It's a case involving the ordinary  
7 business activities of a software company.

8                   Moreover, the Government's witnesses repeatedly testified  
9 that they did not intend or agree to do anything wrong, much  
10 less illegal.

11                  We don't think the jurors should be instructed that they  
12 can convict Mr. Hussain for the innocuous business activities  
13 of purported co-conspirators whose own testimony disproved the  
14 existence of the over-arching conspiracy alleged in the  
15 Indictment.

16                  So what they are trying to do is treat this like this is  
17 some massive criminal enterprise and that all of Autonomy's  
18 business activities amount to some massive conspiracy. We  
19 don't think a *Pinkerton* instruction is warranted in this case  
20 and we object.

21                  **THE COURT:** Of course the Government believes it is a  
22 conspiracy. The Government believes it is larger than this  
23 defendant. And the Government has introduced a fair amount of  
24 evidence relating to Mr. Chamberlain, Dr. Lynch, and maybe  
25 others.

## CHARGING CONFERENCE

1       The Government has also introduced evidence of -- repeated  
2 evidence of customers who falsified declarations to -- you  
3 know, to Deloitte.

4       So, I mean, I think there is plenty of evidence.  
5 Admittedly it's from the Government. I'm not crediting it or  
6 not crediting it. But to suggest that there is a much larger  
7 conspiracy than -- than the defendant who is on trial here.  
8 And that's what I think -- that's why I think -- and activities  
9 by a lot of those people. And that's why I think 8.25 is  
10 warranted. However, it is over objection.

11       **MR. GRAY:** Over our objection.

12       **THE COURT:** Over your vehement objection.

13       Now we go to 8.25, wire fraud. Any problem with that?

14       **MR. LEACH:** One point from the Government, Your Honor.  
15 We're fine with the language of the instruction. We had  
16 proposed some language from the mail fraud instruction, which  
17 says, "It does not matter whether the material transmitted by  
18 wire was itself false or deceptive so long as the wire  
19 communication was used as part of the scheme, nor does it  
20 matter whether the scheme or plan was successful or that any  
21 money or property was obtained."

22       This is language from the Ninth Circuit Model Instruction  
23 for mail fraud. For the life of me, I don't understand why  
24 it's not in the Model Instruction for wire fraud, but it's an  
25 accurate statement of the law. I think it helps illustrate

## CHARGING CONFERENCE

1 that the wire itself doesn't have to be a false statement. And  
2 we request that the Court include it. It was included on lines  
3 23 through 26, page 70, of the joint submission.

4 **MR. GRAY:** Your Honor, we oppose. We think the  
5 Government's proposed additions -- well, as Mr. Leach just  
6 stated, they don't appear in the Model Instruction. They are  
7 unnecessary. We believe they would cause needless confusion.  
8 They should be excluded.

9 **THE COURT:** So I'd like to ask the Government a  
10 question. Do you have a case which says that I should put this  
11 in the Model Instruction?

12 **MR. LEACH:** First, I want to be clear, it is in the  
13 Model Instructions --

14 **THE COURT:** For wire fraud.

15 **MR. GRAY:** Not for wire fraud.

16 **THE COURT:** So my question is clear, do you have a  
17 wire fraud case which says that yes, it should be in?

18 **MR. LEACH:** I do. *United States vs. Halali*, a case  
19 from this district presided over by Judge Illston.

20 *United States vs. Woods*, 355 F.3d --

21 **THE COURT:** Give me the cites. I'm going to go look  
22 at it. The cite -- cites -- citations.

23 **MR. GRAY:** Your Honor, they're in the Government's  
24 brief --

25 **THE COURT:** I don't -- there are 50 million pieces of

## CHARGING CONFERENCE

1 paper in this case. Just give it to me. Do you want an answer  
2 today or do you want it next week?

3 **MR. LEACH:** I want an answer today, Your Honor.

4 **THE COURT:** Then give it to me.

5 **MR. LEACH:** It's *United States vs. Woods*, 355 F.3d 993  
6 at pages 997 to 98. It's a Ninth Circuit 2000 --

7 **THE COURT:** Okay. Any other case, or I guess I'm  
8 capable of Shepardizing or at least somebody in my chambers is  
9 capable of Shepardizing.

10 **MR. LEACH:** One more, Your Honor. *United States vs.*  
11 *Rude*, R-U-D-E, 88 F.3d 1538. Pincite is 1547.

12 **MR. GRAY:** Your Honor, I will just say also we have  
13 proposed accurate statements of conspiracy law to a number of  
14 these constructions, so if you're going to include what they're  
15 representing to you are additional accurate details about  
16 conspiracy law here, there is no reason to have excluded them  
17 from the instruction that we just talked about.

18 **THE COURT:** Well, yeah. I mean, I don't like to -- my  
19 general approach to this, which the Government is well aware  
20 of, is that I don't sort of like pick and choose nice little  
21 things to put in because they happen to be in some case and --  
22 but I do -- the distinction between wire fraud and mail  
23 fraud -- and I've never quite understood why both are charged.  
24 I'm sure there is some reason out there. They can't be -- if  
25 convicted of both, they -- I don't think they enhance a

## CHARGING CONFERENCE

1 penalty, though I haven't looked at that, so I just -- I don't  
2 really get it.

3 But anyway, that's the way it's presented, and I'll look  
4 at that. Okay.

5 **MR. LEACH:** Thank you, Your Honor.

6 **THE COURT:** So moving right along.

7 **MR. GRAY:** Your Honor, one more note on 8.124, we  
8 oppose the inclusion of the phrase "participated in" in the  
9 Court's proposal. That language does not appear in the  
10 Indictment. We -- we don't think that that language should  
11 make it into the jury instruction.

12 **THE COURT:** You're referring to line 20 or 19?

13 **MR. GRAY:** I'm sorry. In your -- in the Court's  
14 proposal, this is -- it looks like line 7.

15 **THE COURT:** Line 7?

16 **MR. GRAY:** "First, the defendant knowingly  
17 participated in, devised or intended to devise."

18 And the phrase "participated" in does not appear in the  
19 Indictment. We don't think they should be able --

20 **THE COURT:** I must be looking at the wrong -- I'm  
21 looking at my instruction, page 18.

22 **MR. GRAY:** It's page 21, Your Honor, wire fraud.  
23 That's what we're talking about.

24 **THE COURT:** 8.20. My instruction, 8.20 --

25 **MR. GRAY:** No. 8.12 --

## CHARGING CONFERENCE

1                   **THE COURT:** I was looking at the wrong one. My law  
2 clerk -- "First, the defendant knowingly participated in,  
3 devised or intended to devise." 8.124. Is it in here or some  
4 other book? I'll take a look at it.

5                   **MR. LEACH:** It's the language from the Model  
6 Instruction, Your Honor.

7                   **THE COURT:** I think it is, but I'll take a look at it.

8                   **MR. LEACH:** And the Indictment charges the exact  
9 language of the wire fraud statute. So I don't think there's  
10 any magic to that word not being in the -- in the Indictment.  
11 We charged the statute word-for-word and --

12                  **THE COURT:** See, the problem you have here, as I  
13 understand it -- and I think it's of some significance -- is I  
14 don't know that there is evidence that Mr. Hussain devised it.  
15 It may be, for example, that somebody said to Mr. Hussain,  
16 "Hey, here's -- here's a good idea." No -- the Government  
17 didn't say he devised it. He -- the Government's view is he  
18 participated in it.

19                  And so I think it would be misleading -- if the statute  
20 provides -- and if I have -- I have to take a look, but I think  
21 it is -- it is warranted that a person who participates in a  
22 wire fraud or mail fraud is as guilty as somebody who thought  
23 it up.

24                  **MR. KEKER:** Your Honor, if I --

25                  **THE COURT:** Well, yes, Mr. Keker, go ahead.

## CHARGING CONFERENCE

1 I'm letting everybody talk, everybody talk. So that's  
2 perfect.

3 **MR. KEKER:** The Indictment couldn't be more plain that  
4 the charge the grand jury returned is that Mr. Hussain "devised  
5 and intended to devise a scheme or artifice." It doesn't say  
6 he participated in. It says what it says.

7 It would be an extremely prejudicial variance to now put  
8 into the jury instruction something that the grand jury did not  
9 charge him with.

10 **MR. LEACH:** It's not --

11 **MR. KEKER:** And we would object to it.

12 **THE COURT:** Mr. Leach?

13 **MR. LEACH:** It's not a variance, Your Honor. The  
14 Indictment charges the exact language of 18 U.S.C. 1343, which  
15 I'm happy to read, if I can --

16 **THE COURT:** I better look at the Indictment.

17 **MR. GRAY:** Your Honor, I would also say if we are  
18 going to use the language from the Indictment about the first  
19 quarter of 2009, I don't know why we aren't using the exact  
20 language from the Indictment as to this issue.

21 **THE COURT:** Because consistency is the hobgoblin of  
22 small minds.

23 Go ahead.

24 **MR. KEKER:** Who said that? Somebody said that was  
25 Ralph Waldo Emerson.

## CHARGING CONFERENCE

1                   **THE COURT:** Yeah. Right.

2                   **MR. LEACH:** I thought it was Thoreau.

3                   **MR. KEKER:** I thought it was Oliver Wendell Holmes,  
4 and this is now the big thing in my mind.

5                   **THE COURT:** We can -- we can search that. I mean, I  
6 was told it was Emerson, but that was before Holmes' career.

7                   **MR. HOWELL:** Or is it The Dude?

8                   **MR. KEKER:** I'm sure The Dude said it.

9                   **THE COURT:** We have everybody -- now we have  
10 Ms. Little in the game.

11                  **MS. LITTLE:** Mr. Dooley pointed out that --

12                  **THE COURT:** Now we have Mr. Dooley. Of course.

13                  **MS. LITTLE:** -- that 1343 does not say "participated."  
14 It says, "whoever having devised or intending to devise," which  
15 is what the Indictment says, which is what the jury instruction  
16 should say.

17                  **THE COURT:** It would be news to me, after 21 years,  
18 that a person -- that the Government has to prove who devised  
19 it. I mean, I -- I --

20                  **MR. GRAY:** They could have put the word "participated"  
21 in the Indictment; they didn't.

22                  **THE COURT:** They didn't what?

23                  **MR. GRAY:** They didn't put the word "participated" in  
24 the Indictment.

25                  **THE COURT:** No, but I mean, I'm -- I'm trying to think

## CHARGING CONFERENCE

1 of whether the scope of the statute reasonably interpreted  
2 involves a person who participates in it because it seems to me  
3 there are thousands and thousands of wire fraud convictions in  
4 which the Government failed to show that the -- that the  
5 defendant devised it.

6 **MR. HOWELL:** The Ninth Circuit says "participated."

7 That's how the Ninth Circuit says --

8 **THE COURT:** Okay. Well, I will take a look at it.  
9 I'm getting advice from everybody. That's great.

10 Anyway, I think I have the arguments.

11 **MR. LEACH:** We charge the full scope of 1343,  
12 Your Honor. We use the language of the statute.

13 **MS. LITTLE:** No, you didn't.

14 **THE COURT:** Okay.

15 **MR. LEACH:** The Ninth Circuit has interpreted that to  
16 include "participated in." This is the Model language of the  
17 statute. It should be included.

18 **THE COURT:** You know what? I'm going to go look at  
19 it. I'm going to start with Holmes --

20 **MS. LITTLE:** Do you want the Indictment? I've got it  
21 here if you want it.

22 **THE COURT:** Yes. I think the Indictment would be  
23 useful. Okay. There we go. Okay. Thank you very much.

24 This isn't your only copy, is it?

25 **MR. GRAY:** I have a copy.

## CHARGING CONFERENCE

1                   **THE COURT:** I don't want to deprive the Defense --

2                   **MS. LITTLE:** I can get another one.

3                   **THE COURT:** You can get another one? Okay.

4                   Going right ahead.

5                   So that's your objection and I'll deal with that.

6                   I will, by the way, send out today a final copy of the  
7 instructions. Okay? So you can prepare your argument along  
8 those lines.

9                   Okay. "Knowingly," 5.6, any problems?

10                  **MR. LEACH:** No.

11                  **THE COURT:** 3.16, "intent to defraud."

12                  **MR. LEACH:** No objection.

13                  **MR. GRAY:** No.

14                  **THE COURT:** Now, here in this "scheme to defraud,  
15 "vicarious liability" and so forth -- well, I think I need --  
16 I'm trying to figure out why the *Pinkerton* instruction isn't  
17 good enough to cover this whole question of vicarious  
18 liability. "Vicarious liability" means X does something, the  
19 defendant may be responsible for it. That's what *Pinkerton* is  
20 about, isn't it?

21                  **MR. GRAY:** Your Honor, that is exactly our position on  
22 this. If you look at the language of 8.122, "the defendant may  
23 be responsible for other co-schemer's actions during the course  
24 of and in furtherance of the scheme. For the defendant to be  
25 guilty of an offense committed by a co-schemer in furtherance

## CHARGING CONFERENCE

1 of the scheme, the offense must be one that the defendant could  
2 reasonably foresee as a necessary and natural consequence."

3 Then look at *Pinkerton* which says, "If one member of a  
4 conspiracy commits a crime in furtherance of the conspiracy,  
5 the other members have also, under the law, committed that  
6 crime. The offense must be one that could reasonably have been  
7 foreseen by the defendant based on what he knew at the time to  
8 be a necessary and natural consequence of the unlawful  
9 agreement."

10 It's entirely duplicative. 8.122 should be struck.

11 **MR. LEACH:** The concern from the Government,  
12 Your Honor, is -- and this may be somewhat academic -- I think  
13 it's possible -- I think it's possible that a juror could find  
14 there is no conspiracy. There is no agreement. And yet two  
15 people are members of a scheme. And I don't want there to be a  
16 situation where --

17 **THE COURT:** I see.

18 **MR. LEACH:** -- they acquit on the conspiracy charge  
19 but feel if Mr. Hussain didn't devise the scheme or was  
20 merely --

21 **THE COURT:** So maybe it should be -- that is a  
22 possibility. I think -- I don't even understand how it's -- I  
23 mean, I don't believe that the Defense is going to argue that.  
24 But be that as it may, I -- I think then you give 8.122. Isn't  
25 that it?

## CHARGING CONFERENCE

1                   **MR. LEACH:** Yes.

2                   **THE COURT:** I think you start out by saying, "In the  
3 event, ladies and gentlemen, you do not find a conspiracy,  
4 nevertheless," bop, bop, bop, bop, bop, bop, bop, what it says.  
5 I mean, that's the way to deal with that possibility.

6                   So I'll take a look at it and see -- well, you can't aid  
7 and abet a conspiracy. Okay. So that's -- that's different  
8 from aiding and abetting. We all know that.

9                   **MR. LEACH:** Correct.

10                  **THE COURT:** Okay. Okay. That's fine.

11                  **MR. GRAY:** We have --

12                  **THE COURT:** And you object.

13                  **MR. GRAY:** We object. You will take it under  
14 submission.

15                  **THE COURT:** All right. I just need to see whether I  
16 can tailor -- tailor that to it. Okay.

17                  Now, what are we doing about negligence? We're not  
18 doing -- I'm not going to give any instruction on negligence,  
19 am I?

20                  **MR. LEACH:** Oh, I think this instruction is entirely  
21 appropriate, Your Honor.

22                  **THE COURT:** Don't you think all yours are entirely  
23 appropriate?

24                  **MR. LEACH:** Yes.

25                  **THE COURT:** So how do I distinguish this one from all

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1 the others that you want me to give? Is this more appropriate  
2 than like the presumption of innocence?

3 **MR. LEACH:** No, Your Honor. They're all equally  
4 important.

5 **THE COURT:** Okay.

6 **MR. LEACH:** The defense in this case has been to blame  
7 the victim, much as the Government predicted. They've asked  
8 question after question why didn't HP do this, why didn't HP do  
9 that. They are trying to suggest that because HP is a big  
10 company, that it's not deserving of the protection of the law.

11 This is an accurate statement of the law, Your Honor. The  
12 negligence of the victim is not a defense to fraud.

13 **THE COURT:** I see. It's the victim's negligence.

14 **MR. LEACH:** Yes. We are not arguing Mr. Hussain can  
15 be convicted on a negligence theory. We think, given the way  
16 the case was tried, given the amount of innuendo about HP and  
17 their dysfunction, which the Court identified yesterday, this  
18 is an appropriate instruction.

19 **THE COURT:** Okay. Now --

20 **MR. GRAY:** Your Honor --

21 **THE COURT:** Before we get to you --

22 **MR. GRAY:** Sure.

23 **THE COURT:** -- let me just ask, of course "negligence"  
24 hasn't been defined, so I would have to define it, wouldn't I?

25 **MR. LEACH:** That would be fine.

## CHARGING CONFERENCE

1                   **MR. GRAY:** Your Honor --

2                   **THE COURT:** And -- and then you start to define it --  
3 go ahead.

4                   **MR. GRAY:** We vigorously oppose the inclusion of this  
5 instruction. The instruction is confusing and misleading  
6 because it completely mischaracterizes our defense.

7                   Now, I want to emphasize there is an important distinction  
8 between carelessness and not caring. We are not saying that HP  
9 was careless. We are saying that HP didn't care about some  
10 information. We are not advancing any argument or theory that  
11 HP acted negligently.

12                  Your Honor, what HP did and said during due diligence is  
13 also necessary to understanding whether the statements made by  
14 Mr. Hussain or by Autonomy were false or misleading. But this  
15 instruction suggests that that information should be written  
16 off because it goes to, quote -- you know, the negligence of  
17 the victim. That's -- that's confusing, that's misleading. It  
18 does not belong in the jury instructions.

19                  Your Honor, what HP cared about and didn't care about also  
20 goes to materiality and this --

21                  **THE COURT:** Well, clearly what they cared about, what  
22 they didn't care about is significant.

23                  **MR. GRAY:** Yes.

24                  **THE COURT:** That's clear, isn't it? I mean, nobody  
25 disputes that. And your argument, as I understand it -- and it

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1 makes sense -- is that, look, you start talking about care  
2 and -- and you --

3 **MR. GRAY:** Well, you start talking about carelessness  
4 and that's not what we're talking about. The whole point is  
5 that we are not talking about negligence. This information is  
6 not evidence of negligence. It goes to what HP cared about,  
7 and that's an important issue that speaks to whether  
8 Mr. Hussain's representation were false, whether they were made  
9 in good faith, whether they were material.

10 This instruction is confusing. I would also add,  
11 Your Honor, it's argumentive. HP is only a, quote, victim, if  
12 you believe the Government's case. And this -- this  
13 instruction is certainly no more -- our proposed instructions  
14 were certainly no more argumentive than this one is. If you  
15 are going to add this one, you should certainly add ours about  
16 the conduct that is not illegal.

17 Setting all of that aside, we just think this instruction  
18 does not belong in the jury instructions.

19 **MR. LEACH:** This is an accurate statement of recent  
20 Ninth Circuit law, *United States vs. Lindsey*.

21 I agree with the Defense. Some of their evidence can be  
22 interpreted as evidence of materiality. That makes the  
23 instruction even more important, not less important because a  
24 juror could think well -- listening to the same evidence, could  
25 think, "Well, HP was just sloppy, they spent four phone calls

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1 on diligence. Why should I -- why should we convict here?"

2 It's exactly correct --

3 **THE COURT:** So why not give exactly the instruction  
4 that you're proposing? Why not -- why not say just what you  
5 said, which is while evidence of -- of care or lack of care may  
6 be material, evidence of carelessness is not. Is not -- I  
7 paraphrased what you said. But why not just say it just the  
8 way you said it?

9 **MR. GRAY:** Your Honor, we just think that confuses the  
10 issues. I can represent to you that we are not going to argue  
11 that HP was negligent. Okay. That's not what we're doing  
12 here.

13 **THE COURT:** Yeah. But I have to go beyond an  
14 argument. In other words, I have to instruct the jury as to  
15 what issues I think that the jury may be -- they come to their  
16 own conclusions. Their deliberations are their own. Somebody  
17 suggests something and it then -- they then look at the law.  
18 They then look at the instructions and say, "Well, what about  
19 this," and somebody says, "Well, did the Court instruct us on  
20 that?" And maybe I've idealized it.

21 But I think the parties are entitled to not just tailoring  
22 instructions to what is going to be argued, but also having a  
23 set of instructions that encompass potential conduct. So I'm  
24 sitting here thinking why not give it just the way you said it?  
25 I mean, in so many words.

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1           Anyway, I'll consider this as well. Okay.

2           **MR. LEACH:** Thank you, Your Honor.

3           **THE COURT:** Okay. Moving ahead. Anything with  
4 securities fraud?

5           **MR. GRAY:** Not from us, Your Honor.

6           **THE COURT:** "Aiding and abetting," everybody agree you  
7 can't aid and abet a conspiracy?

8           **MR. GRAY:** Your Honor, we -- on "aiding and abetting,"  
9 we prefer our version. We understand the Court has ruled.

10           **THE COURT:** Okay.

11           **MR. LEACH:** Your Honor --

12           **THE COURT:** Here we go. Defense theory about the  
13 case.

14           **MR. LEACH:** Your Honor, I should probably raise this  
15 now with the "aiding and abetting" argument.

16           The current draft -- the Government proposed an  
17 instruction for "willfully causing," which is drawn from the  
18 language of 18 U.S.C. Section 2(b), which provides, quote,  
19 "Whoever willfully causes an act to be done, which if directly  
20 performed by him or another, would be an offense against the  
21 United States" -- I'm sorry. I misread that.

22           "Whoever willfully causes an act to be done, which if  
23 directly performed by him or another, would be an offense  
24 against the United States as a principal." This language from  
25 18 U.S.C. Section 2(b) is not covered by the Model "aiding and

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1 abetting" instruction in the Ninth Circuit, but it is addressed  
2 by some of the commentary to the Model Instruction.

3 And it's particularly important here because part of the  
4 Government's theory on the securities fraud charge is that  
5 Mr. Hussain caused HP to issue a press release to the market  
6 that was false. It's not our contention that HP was guilty of  
7 a crime by doing that. So they're not a principal.

8 But the Government's theory is that Mr. Hussain willfully  
9 caused HP to do that. They're essentially an innocent  
10 intermediary in the language of Section 2(b) in the Ninth  
11 Circuit case *United States vs. Ubaldo*. I don't know if it has  
12 to be an "aiding and abetting" instruction, but I think this --  
13 this principle of "willfully causing" needs to be encompassed  
14 in the instructions.

15 **THE COURT:** Why isn't it covered by the lines 15 and  
16 of the proposed instruction? "The evidence must show beyond  
17 a reasonable doubt that the defendant acted with the knowledge  
18 and intention of helping that person commit the crime charged."  
19 Why isn't that what you've just discussed?

20 **MR. LEACH:** I'm -- I'm concerned because it still lays  
21 out four elements for aiding and abetting, and the first  
22 element is that the crime --

23 **THE COURT:** The crime was committed by someone. Okay.  
24 What does that mean? Who committed the crime? For instance,  
25 the crime -- I understand that it's your view that the

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1 defendant was the principal, but -- but we're going on an  
2 aiding-and-abetting theory so how are you arguing the aiding  
3 and abetting?

4 **MR. LEACH:** We are going under the "willfully causing"  
5 language of 18 U.S.C. Section 2(b) which says that if you --  
6 if -- if the person whom you are aiding and abetting is not  
7 guilty of a crime, he can't be an aider and abettor. The  
8 "willfully causing" language says if you cause an innocent  
9 person, which if you had done it directly would be a crime, you  
10 are guilty. So this -- this doesn't cover that.

11 **THE COURT:** I recently had that in a case where they  
12 couldn't show that the person who put the gun in the -- in the  
13 trashcan had committed a crime, but the fact of the matter is  
14 the defendant on trial had directed somebody to go pick up the  
15 gun.

16 **MR. LEACH:** Exactly.

17 **THE COURT:** And that was a proper, in my -- I think I  
18 gave that "aiding and abetting" instruction as modified. Okay.  
19 Well, I'll think about that.

20 **MR. GRAY:** Your Honor, we --

21 **THE COURT:** Vigorously --

22 **MR. GRAY:** -- oppose the instruction. We think the  
23 Government's proposal is also extremely confusing.

24 If the Court is inclined to issue such an instruction, it  
25 should look to ours. It's far more clear.

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1 We oppose the inclusion of the instruction.

2 **THE COURT:** All right. Fair enough. And I'll look at  
3 that, too. Okay.

4 Do we get to go to the Defense theory of the case? All  
5 right. And you gave it to me. So I haven't looked at it yet.

6 **MR. KANIG:** Yes, Your Honor. We filed it last night.

7 **THE COURT:** All right. Well, that was last night.

8 Hopefully it's here somewhere. Here it is. Okay. Let me look  
9 at it.

10 (The Court reviews the document.)

11 **THE COURT:** I can tell you right now I'm not going to  
12 give examples, so -- I don't do that. You say, "For example,  
13 Mr. Hussain understood that it was appropriate" and so forth.  
14 I just don't single out any evidence.

15 **MR. KANIG:** Your Honor, the Ninth Circuit has very --

16 **THE COURT:** You get -- you get a theory of the case.  
17 You don't get an argument as to how it applies given a  
18 particular bit of evidence, do you?

19 **MR. KANIG:** I think so. I mean, that is our theory of  
20 the case.

21 Our theory of the case is that Mr. Hussain understood that  
22 it was appropriate under IFRS-8 that they did not need to  
23 separately disclose hardware sales and that their recognition  
24 of revenue and the reseller transactions under IAS-18 was also  
25 appropriate. That is, at the highest level, our theory of the

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1 case. And I think that the Ninth Circuit has said that if  
2 there is in foundation in the evidence for --

3 **THE COURT:** There may be a foundation in the evidence  
4 to give a theory of the case, but you're asking me to give an  
5 example of the evidence in the case, which would be consistent  
6 with the Defense theory.

7 And I -- I'll go look at the case -- but am I not  
8 communicating? In other words, I don't give an instruction  
9 that says, "It is the Government's view that the following  
10 statements were false because" or -- "because they had  
11 understood" or "that it was communicated a particular way" or  
12 "it meant a particular thing" and so forth, "that revenues were  
13 this and hardware sales were that" and so forth. I don't go  
14 into a discussion of the Government's case.

15 This suggests to me that I do enter into discussion and  
16 tell the jury what the -- I comment on the evidence. I don't  
17 comment on whether it's believable or not. I comment on the  
18 fact that this is an example -- as you say, "for example."  
19 It's an example of the evidence in the case, your  
20 interpretation of the evidence of the case.

21 Now, if you're saying to me, "Well, that's what the  
22 Defense theory is," I don't know -- again, I have to take a  
23 look at it.

24 Anyway, let me read the whole thing. Okay? So I'll get  
25 it. Because I'm just taking a piece of it.

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1                   **MR. KANIG:** Your Honor, if the issue is the phrase  
2 "for example," we are happy to take that out. I mean, if that  
3 phrase wasn't there, I think --

4                   **THE COURT:** No, no, no.

5                   **MR. LEACH:** I think that would be instructing them on  
6 a fact that Mr. Hussain understood something. That makes it  
7 worse.

8                   **THE COURT:** Okay. Well -- okay. Let me read it.  
9 Okay. In fairness to you.

10                  **MR. KANIG:** Okay.

11                  (Whereupon, the Court reads the document.)

12                  **THE COURT:** Well, okay. Okay.

13                  Now, let me turn to the Government. I think I have a  
14 better understanding -- I think, by the way, that can be  
15 cleared up by some language changes. I mean, it would be -- it  
16 would be -- it would be, "The Defense contends that Mr. Hussain  
17 understood that. It is their contention that." And that's  
18 probably a better way of phrasing it.

19                  **MR. KANIG:** That would be fine.

20                  **THE COURT:** Okay. All right. I just got off on a  
21 tangent. Okay.

22                  I now want to address the whole question of the  
23 instruction and what the Government's view is.

24                  **MR. LEACH:** Our view is this is argument. Our view is  
25 this --

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1                   **THE COURT:** Well, first of all, let's start at the  
2 beginning. You don't quarrel with the proposition that they  
3 are entitled to an instruction on their theory of the case, or  
4 do you?

5                   **MR. LEACH:** Only if it's not covered by the other  
6 instructions, and the other instructions I hear make perfectly  
7 clear the defendant needed to act with the intent to defraud,  
8 he needed to agree to enter into a conspiracy --

9                   **THE COURT:** Well, are you saying that -- are you  
10 saying that -- that the defendant's theory of the case is that  
11 he's not guilty of the charges because in fact the elements  
12 haven't been proven? That's true. That is their -- that's the  
13 defense. I don't know that that's the theory of the case.

14                   **MR. KANIG:** Yeah --

15                   **THE COURT:** By the Ninth Circuit I'm required to --  
16 otherwise, I'd say I said it already. I said it in Instruction  
17 No. 1. The defendant has entered a plea of not guilty and --  
18 and it is to be presumed to be innocent and does -- you know, I  
19 don't elaborate, but the elements of the offense have not been  
20 proven. Okay. But that's not the defense theory of the  
21 case --

22                   **MR. KANIG:** No, Your Honor.

23                   **THE COURT:** -- as I understand the Ninth Circuit.

24                   So let's assume for the moment that I have to say more  
25 than just he pled not guilty and there's -- and we have a trial

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1 and here are the elements of the offense. Let's say I say  
2 more.

3 Now, tell me what's wrong with this instruction in saying  
4 more.

5 **MR. LEACH:** I think it's argument. I think it singles  
6 out particular auditing standards that may or may not be  
7 significant to the jury. I think it's use of, you know,  
8 employees in the United States, why not just say "employees."

9 **THE COURT:** Why don't you give me a -- why don't you  
10 give your proposed --

11 **MR. KANIG:** Your Honor, I don't think the Government  
12 should be allowed to write our Defense theory of the case. I  
13 take their point that it's argumentative, but to some degree,  
14 this will always be a little bit argumentative in their eyes.  
15 It's a question of degree.

16 This is a very high-level analysis of our Defense theory  
17 of the case. It doesn't reference any specific evidence or  
18 testimony by witnesses. This is the highest level that we can  
19 do with -- with, you know -- and still have a Defense theory of  
20 the case.

21 **THE COURT:** You may be right, but I think they are  
22 entitled to comment on the instruction and they are entitled to  
23 say why they think anything in it is impermissibly  
24 argumentative, and that's what they're saying.

25 No. I think you're right that they can't write the

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1 instruction, but they can comment on the proposed instruction,  
2 and that's what I'm asking them to do.

3 **MR. KANIG:** Fair enough, Your Honor.

4 **THE COURT:** All right.

5 **MR. LEACH:** Thank you, Your Honor.

6 **THE COURT:** So rather than go through line after line,  
7 just give it to me as quickly as possible and I'll -- I'll look  
8 at it. And I think I have it in mind.

9 And, again, you want to say something about it, it's  
10 called writing a -- two pages, which I think would be a record  
11 in this case; that is to say, anything confined to two pages  
12 would be unprecedented.

13 Okay. Anything else?

14 **MR. KANIG:** Nothing --

15 **THE COURT:** Good. Hearing nothing else --

16 **MR. KANIG:** Well, I'm sorry --

17 **MR. GRAY:** We do --

18 **THE COURT:** What? I don't mean anything else on this  
19 instruction. I mean --

20 **MR. KANIG:** Generally anything else?

21 **THE COURT:** Generally.

22 **MR. KANIG:** Yes, Your Honor. There are --

23 **THE COURT:** Well, other than -- other than the -- I  
24 have in mind -- and you're not waiving any objections you have  
25 raised as to the instructions we've already discussed and you

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1 have filed, so you don't have to repeat those.

2 **MR. KANIG:** Yes, Your Honor. I understand.

3 I just wanted to flag three of the remaining instructions  
4 that we have not discussed of the Defense instructions that I  
5 think --

6 **THE COURT:** Go ahead.

7 **MR. KANIG:** -- are absolutely critical in this case.

8 **THE COURT:** Go ahead. I know these are more important  
9 than even the presumption of innocence. Go right ahead.

10 **MR. KANIG:** Thank you, Your Honor.

11 Like I said, I think there are three remaining  
12 instructions --

13 **THE COURT:** What are they?

14 **MR. KANIG:** The first is that accounting violations  
15 are not a criminal act in and of themselves.

16 **THE COURT:** Oh.

17 **MR. KANIG:** This has been an extraordinarily long  
18 trial in which I guarantee the jury is confused about what is  
19 and isn't a crime in the context of a violation of an  
20 accounting standard.

21 **THE COURT:** I did this in the *Reyes* case.

22 **MR. KANIG:** That is exactly right, Your Honor, and we  
23 think that --

24 **THE COURT:** And I think it is warranted. And what I  
25 said -- I think it's warranted. I think it's warranted because

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1 a juror sits there and says, "Hey, this is the way revenues  
2 should have been reported under this structure -- stricture.  
3 Now, he said he did, but did he do so with the intent? But  
4 it's clear he didn't and therefore it in and of itself -- in  
5 and of itself" -- so what I said in *Reyes* was -- which  
6 ultimately was affirmed -- is as follows:

7 "You have heard references during the trial to the  
8 United States generally-accepted accounting principles, U.S.  
9 GAAP, and the United Kingdom generally-accepted practice, UK  
10 GAAP, and the International Financial Reporting Standards,  
11 IFRS. You are instructed that the accounting principles that  
12 govern Autonomy Limited were the International Financial  
13 Reporting Standards."

14 Any problem -- I will read the whole thing.

15 "In and of itself, a violation of accounting principles,  
16 opinions, standards or guidelines does not establish a  
17 violation of the criminal law. However, evidence of such  
18 accounting violations may be considered by you, along with all  
19 the other evidence, in connection with the crimes charged in  
20 the Indictment."

21 **MR. KANIG:** Exactly, Your Honor. And there is no  
22 reason why those last two sentences that you read won't address  
23 all the concerns that they're about to raise about --

24 **THE COURT:** Well, we'll see.

25 **MR. KANIG:** Well, I hope so, Your Honor.

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1                   **THE COURT:** Well, we'll see something.

2                   **MR. LEACH:** First, Your Honor, the line "You are  
3 instructed that the accounting principles that governed  
4 Autonomy Limited were the International Financial Reporting  
5 Standards" --

6                   **THE COURT:** I don't know that I would say that.

7                   **MR. LEACH:** That is not appropriate.

8                   **THE COURT:** Okay.

9                   **MR. LEACH:** That's a disputed fact. And whatever it  
10 is, it's a fact.

11                  **THE COURT:** And it's not necessary to the instruction.

12                  **MR. KANIG:** I'm sorry --

13                  **THE COURT:** It's actually not necessary to the  
14 instruction.

15                  **MR. KANIG:** I apologize, Your Honor. That was the  
16 "you are instructed," that sentence? "The accounting  
17 principles that governed Autonomy were the IFRS." Is that what  
18 he objected to?

19                  **THE COURT:** That's what I struck, but that's over your  
20 objection.

21                  **MR. KANIG:** That's fine with us, if that sentence  
22 comes out.

23                  **THE COURT:** No objection. There we go. Okay. So it  
24 would just be just as I've said, with the exception of that.

25                  **MR. LEACH:** The United States recommends if this

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1 instruction is to be given, it read, "In and of itself, a  
2 violation of accounting principles, opinions, standards or  
3 guidelines does not necessarily establish a violation of the  
4 criminal" --

5 **MR. KANIG:** Your Honor, that undoes the instruction.

6 **THE COURT:** Nice try.

7 Next?

8 **MR. LEACH:** Thank you, Your Honor.

9 **MR. KANIG:** Thank you, Your Honor.

10 **THE COURT:** I mean, it does not necessarily -- but --  
11 but -- well --

12 **MR. LEACH:** There is a way to read this, Your Honor,  
13 that says they proved a violation of the accounting standards,  
14 so what? I can't even consider that. I just --

15 **THE COURT:** Well, I think I have -- I think -- well,  
16 maybe I should change it to say -- because I think this is a  
17 bit perhaps fairer to say -- starting the paragraph, "A  
18 violation of accounting principles, opinions, standards or  
19 guidelines in and of itself does not establish a violation of  
20 the criminal law."

21 **MR. KANIG:** That's fine with us, Your Honor.

22 **THE COURT:** Rather than just say "necessarily." I  
23 know that they're different concepts, but I'm just trying to  
24 figure out --

25 **MR. REEVES:** No problem.

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1                   **MR. LEACH:** That's fine, Your Honor.

2                   **THE COURT:** Okay. So I'll change --

3                   **MR. KANIG:** And, Your Honor, just going off of that, I  
4 would also ask that you give the same instruction that you gave  
5 in *Reyes* with regard to backdating, which is just a subset of  
6 this instruction which is that backdating a contract --

7                   **THE COURT:** Backdating, of course, was the whole thing  
8 in *Reyes*. This is just one aspect of it.

9                   **MR. KANIG:** It's one aspect of it, but it's an aspect  
10 that they have spent a tremendous amount of time during this  
11 trial focusing on and I don't think there is any principal  
12 distinction --

13                   **THE COURT:** Tell me about backdating for a moment.

14                   **MR. LEACH:** I think the context in *Reyes* is  
15 important --

16                   **THE COURT:** Pardon?

17                   **MR. LEACH:** I think the context of *Reyes* is important,  
18 Your Honor. There the Defense theory was this was some new  
19 type of accounting fraud and it was unfair to hold the CEO or  
20 the vice-president of human resources responsible for some new  
21 type of accounting fraud that no one had ever prosecuted  
22 before.

23                   Auditor after auditor who took the stand here said --

24                   **THE COURT:** I think backdating here is of course  
25 crucial. This whole thing is about -- putting the hardware

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1 sales aside, everything else is backdating. Everything else is  
2 changing it in different quarters and so forth. Backdating may  
3 in and of itself support a conviction, if the other elements  
4 are proven.

5 **MR. KANIG:** That's --

6 **THE COURT:** But that's the problem. If I say Element  
7 No. 6 or piece of Evidence No. 7 in and of itself doesn't do  
8 anything, that's right. Nothing in and of itself does -- I  
9 think I have to say something about accounting standards  
10 because people think accounting standards are the law or don't  
11 think that, but it carries enormous weight.

12 What the -- what the particular *modus operandi* is in a --  
13 in a -- of the -- as shown by the evidence doesn't -- doesn't  
14 really warrant, in the Court's view, a separate instruction  
15 pointing out, you know, nothing -- because -- in and of itself,  
16 you know.

17 No, I'm not going to give a backdating instruction.

18 What's next?

19 **MR. KANIG:** I only have two more. The second one is  
20 the hindsight instruction. I think it is extraordinarily  
21 important --

22 **THE COURT:** More than the last one your raised?

23 **MR. KANIG:** Every one I have is more important,  
24 Your Honor.

25 **THE COURT:** I can't wait until we get to the end.

## CHARGING CONFERENCE

1                   **MR. KANIG:** We are almost there.

2                   **THE COURT:** What is that, this one? Where do I find -  
3 what is this called?

4                   **MR. KANIG:** This is the "hindsight" instruction.

5                   **THE COURT:** Hindsight. Here we go.

6                   "In your deliberations, you are instructed to consider  
7 only what Mr. Hussain knew, believed or understood at the time  
8 of the alleged conduct and not what may be apparent to him or  
9 to others with the benefit of hindsight."

10                  **MR. KANIG:** In light of the restatement, Your Honor,  
11 we think this is a critical instruction. This has -- the jury  
12 has to know that they are --

13                  **THE COURT:** When does hindsight -- by the way, when  
14 does hindsight kick in? When is the 20/20 day? It seems to me  
15 that the 20/20 day that is relevant is -- is -- that your  
16 instruction would go to is what happened on October 3rd. Is  
17 that right?

18                  **MR. KANIG:** I would submit that it's whenever  
19 Mr. Hussain took an action the Government is alleging was in  
20 furtherance of the conspiracy.

21                  **THE COURT:** Wow. Really? I mean --

22                  **MR. KANIG:** Sure.

23                  **THE COURT:** I think -- I think -- I think that an  
24 ongoing conspiracy with a number of crimes over a period of  
25 time, it's highly relevant what he thought on day 2 and what he

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1 thought on day 10 and that's -- they're all hindsight because  
2 he took the action and then something happened. Then he took  
3 another action and something happened.

4 **MR. KANIG:** Well, let me --

5 **THE COURT:** And the repeated -- the fact that things  
6 are repeated is -- is evidence of the lack of mistake, the  
7 intention, the plan. It's highly relevant.

8 Now, it's hindsight. There is no question about it.  
9 Event 2 occurred after Event 1. He had a view as to the day  
10 No. 2.

11 Okay. So I'm really anxious to get to your last one  
12 because this one is not going to be given.

13 What's the most important one?

14 **MR. KANIG:** The last instruction that we have is with  
15 regard to good faith and professional reliance. Reliance on  
16 Deloitte, Your Honor. And --

17 **THE COURT:** Okay. So let's think about that for a  
18 moment. Because usually this comes up on an "advice of  
19 counsel" defense and it could be maybe an "advice of  
20 accountants." I'm trying to remember cases where that is.  
21 Okay.

22 So your -- now, of course we know that in good faith --  
23 that the defense of good faith requires that all of the facts,  
24 the true facts and circumstances, be given to the individual  
25 who then renders an opinion it's fine. And in this case, there

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1 is ample evidence that that was not the case.

2 So I'm now trying to figure out how I would give this  
3 instruction.

4 **MR. KANIG:** Well --

5 **MR. LEACH:** Not only --

6 **MR. KANIG:** If you look on the --

7 **THE COURT:** I will listen to the Defense. It's their  
8 instruction.

9 **MR. KANIG:** Thank you, Your Honor.

10 If you look at the specific language of 5.9, it actually  
11 takes that precisely into account. The last sentence says,  
12 "Unlawful intent has not been proved if the defendant, before  
13 acting, made full disclosure of all material facts to an  
14 accountant, received the accountant's advice as to the specific  
15 course of conduct" --

16 **THE COURT:** Can I ask you this?

17 **MR. KANIG:** I'm sorry?

18 **THE COURT:** Can I ask you this?

19 **MR. KANIG:** Please.

20 **THE COURT:** Are you really going to argue that? You  
21 are going to argue that Deloitte knew everything that was  
22 relevant? Just tell me, are you going to argue it?

23 **MR. KANIG:** At a bare minimum, the hardware case  
24 certainly falls within that ambit.

25 **THE COURT:** You are going to argue it?

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1                   **MR. KANIG:** Lee Welham testified repeatedly that they  
2 were fully aware of all the hardware sales, they were done at a  
3 loss, that they were aware of all the hardware accounting that  
4 went into that. That is precisely what he testified --

5                   **THE COURT:** They are relying on the fact for the  
6 hardware sales.

7                   **MR. KANIG:** At a minimum, Your Honor.

8                   **THE COURT:** I'm just trying to figure it out because  
9 I'm not quite sure we can draw lines in -- on this issue. But  
10 you might be entitled to it, even as to a part, if it's a part  
11 of the fraud, so I don't know that you're not. And I don't  
12 know that I ought to -- well, I mean, they're entitled to --  
13 if -- let's assume for the moment that Deloitte was told  
14 everything that was relevant. And Deloitte comes back to  
15 Autonomy and says, "Go ahead. This is -- this is appropriate,  
16 this is how you ought to state it."

17                  Is that a defense? If the charge were X and Deloitte  
18 reviewed X and reviewed all the facts and circumstances --  
19 well -- the issue was Deloitte said "X is fine, state it the  
20 way you've stated it," because actually that's exactly what  
21 happened here. They -- they rendered an opinion that it was  
22 fine as it what told to them. That would be a defense,  
23 wouldn't it?

24                  **MR. LEACH:** I think that would be evidence supporting  
25 a lack of intent, Your Honor --

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1                   **THE COURT:** But the jury would not have any idea.

2 That's the point.

3                   **MR. LEACH:** I don't think it's a complete defense,  
4 Your Honor.

5                   **THE COURT:** It may not be. They say it is -- they  
6 say -- well, wait a minute, why isn't it a complete defense if  
7 I -- let's say they went and they said, "Look, we want to tell  
8 you a couple of things here. We want to tell you we -- we --  
9 we engineered these dates on -- on the -- on the VAR  
10 agreements. Now, why did we do it? Because, you know, it was  
11 within a day or so, and by the way, whether they recognized the  
12 revenue in point A is not so important because it will come in  
13 the next month." You know, I mean, this is just -- this is  
14 just timing, timing, timing. And they said all that to  
15 Deloitte. And Deloitte came back and said, "That's fine.  
16 That's fine. Just do it the way you did it. That's fine."  
17 That's a defense, isn't it?

18                   **MR. KANIG:** We certainly think so, Your Honor.

19                   **THE COURT:** I thought you thought so because that's  
20 why you submitted the instruction.

21                   **MR. KANIG:** Yes, Your Honor.

22                   **MR. LEACH:** The financial statements that Sushovan  
23 Hussain signs says those financial statements are "my  
24 responsibility," not Deloitte's, not the audit committees, not  
25 somebody else's --

## CHARGING CONFERENCE

1                   **THE COURT:** You are saying he can't rely -- when he  
2 says "they are my responsibility," he can't rely on what  
3 Deloitte tells him?

4                   **MR. LEACH:** I'm saying I know of no case involving  
5 wire fraud or securities fraud where the CFO of a public  
6 company got an instruction that says "reliance on my auditor is  
7 a complete defense to the offense."

8                   The cases they are citing are tax cases where willfulness  
9 is an element, where you have a disparity between the one  
10 seeking the advice and getting the advice.

11                  Sushovan Hussain is a chartered accountant. He knows the  
12 rules. The mere fact that Deloitte says "yes" or "no" on  
13 something might be evidence of a lack of intent and they can  
14 argue that based on the instructions, but I don't think it's a  
15 complete defense.

16                  **MR. KANIG:** Your Honor, there is no principal  
17 distinction between a willfulness standard and a knowing  
18 standard here. There really isn't. If Mr. Hussain, in good  
19 faith, relied on his auditors, Deloitte, one of the Big Four  
20 auditing --

21                  **THE COURT:** What is the Model Instruction here, by the  
22 way?

23                  **MR. KANIG:** 5.9.

24                  **THE COURT:** That is "advice of counsel." You are  
25 saying it's the same.

## CHARGING CONFERENCE

1                   **MR. KANIG:** I'm saying our tailored to say "auditors"  
2 is the exact same thing in principle. There really is no  
3 difference. It's just a good-faith defense.

4                   **MR. LEACH:** This instruction, Your Honor, is intended  
5 when there is a disparity between, you know, the lawyer and the  
6 client or the tax preparer and the ordinary citizen who is  
7 trying to file his taxes.

8                   **THE COURT:** I don't know. And I don't know what we  
9 mean by "ordinary citizen." I don't know.

10                  **MR. KANIG:** There is no special wire fraud statute for  
11 accountants, Your Honor.

12                  **THE COURT:** Is there? I don't think so. Right. I  
13 don't know.

14                  I'd like to see from the Government a -- their  
15 suggested -- in fact, I think they are entitled to some  
16 good-faith argument and I think they are entitled to some  
17 instruction in that regard.

18                  If you think it should be tailored, because as they say  
19 well, that's the hardware sales, you -- but you want it across  
20 the board, don't you? You don't want me to distinguish  
21 hardware sales from anything else? That would be --

22                  **MR. KANIG:** No, Your Honor. That was just  
23 illustrative.

24                  **THE COURT:** Illustrative.

25                  Mr. Frentzen.

## CHARGING CONFERENCE

1                   **MR. FRENTZEN:** Sorry.

2                   **THE COURT:** Does Mr. Leach want to say something?

3                   **MR. LEACH:** My friend and colleague is making the  
4 point that the Government is -- the Government is arguing the  
5 hardware piece vis-à-vis Autonomy -- or vis-à-vis HP and the  
6 market, less so vis-à-vis the accounting of that. So to have  
7 an instruction --

8                   **THE COURT:** No. But they want to do the whole thing.  
9 I mean, they want to do the whole thing.

10                  And, by the way, I think it would be somewhat prejudicial  
11 if I single out a piece of evidence to which I think the  
12 defense may apply and not the other.

13                  Anyway, I'm inclined to give it. If you want to tailor  
14 it --

15                  **MR. LEACH:** We will, Your Honor.

16                  **THE COURT:** -- before -- before midnight tonight,  
17 please do so. Okay.

18                  **MR. KANIG:** Thank you, Your Honor.

19                  **THE COURT:** When I say midnight tonight, I'm actually  
20 talking about 2:00 or 3:00 in the afternoon. That's what I  
21 mean by mid entitlement.

22                  **MR. KEKER:** It depends on the timestamp. We have the  
23 witness.

24                  **THE COURT:** Because I know this group and you will go  
25 to midnight and then some.

## CHARGING CONFERENCE

1           What you will do is you will look and see what is the  
2 Greenwich Mean Time that you can then apply to midnight; right?  
3 Right. Okay.

4           Anything else?

5           **MR. GRAY:** Yes, Your Honor. Just briefly --

6           **THE COURT:** We just heard the most important thing.  
7 So you have something less important?

8           **MR. GRAY:** No. They are all important, but that was  
9 the last of his presentations.

10           **THE COURT:** In his mind it was the most important.  
11 What is most important in your mind?

12           **MR. GRAY:** Couple of quick instructions.

13           We proposed an instruction for 4.8 impeachment.

14           **THE COURT:** 4.8 what?

15           **MR. GRAY:** 4.8, the impeachment evidence.

16           **THE COURT:** The impeachment evidence -- my  
17 understanding, the impeachment evidence deals with a crime  
18 whether they deal with a conviction.

19           **MR. LEACH:** Agreed.

20           **THE COURT:** What is the impeachment evidence?

21           **MR. GRAY:** Well, Your Honor, there is a Model  
22 Instruction that relates to individual impeachment evidence  
23 that goes to particular witnesses so, for example, in this case  
24 if we were to say "You have heard from a witness, Alan Rizek  
25 who," you know, and then it says "specify the basis for

## CHARGING CONFERENCE

1 impeachment," in his case potentially admitted or I think the  
2 Government stipulated to committing bank fraud, "you may  
3 consider that as evidence of whether or not you want to believe  
4 him or not." That's essentially what the instruction advises  
5 us to do.

6 We've sort of simplified it by saying "You have heard  
7 evidence in a couple of different categories. You can consider  
8 this impeachment evidence when deciding whether or not to  
9 believe various witnesses."

10 **MR. FRENTZEN:** This is actually simplified -- sorry,  
11 Your Honor.

12 **THE COURT:** Go ahead.

13 **MR. FRENTZEN:** I am addressing this because as the  
14 Court recalls, there was a lot of discussion about efforts to  
15 impeach witnesses with supposedly prior inconsistent  
16 statements, and as the Court saw, they called no witnesses to  
17 close the loop on impeachment, which the jurors are not going  
18 to understand.

19 All those times they got up and tried to read something to  
20 a witness most of the time was not inconsistent, to begin with.  
21 And then they never closed the loop on the impeachment.

22 What they're trying to do here is to boil it down to a  
23 point where then they can argue they impeached all these  
24 people, which they did not do.

25 **THE COURT:** I'm not going to give it. I don't think

## CHARGING CONFERENCE

1 it's warranted in this case.

2 What is next?

3 **MR. GRAY:** Two more issues, Your Honor.

4 We submitted specific issue unanimity instructions for  
5 wire fraud, securities fraud, and conspiracy. We think those  
6 instructions are warranted, along with an instruction on  
7 multiple conspiracies.

8 Your Honor, in this case, the Government is advancing some  
9 theory that Mr. Hussain either defrauded HP or HP's  
10 shareholders or Autonomy's shareholders. The jury could be  
11 thinking the conspiracy was just -- is there a conspiracy to  
12 backdate Prisa, is there a conspiracy to hide EDD processing  
13 payments, is there a conspiracy to steal \$2.3 million of  
14 software from Autonomy with the DiscoverTech/Truitt whole  
15 fiasco.

16 There are multiple conspiracies at issue in this case.

17 **THE COURT:** Not really. I think there is one scheme  
18 to defraud. I mean, that's what I would find. I don't think  
19 there are multiple conspiracies.

20 Okay. Thank you.

21 What's next?

22 **MR. LEACH:** Nothing from the Government, Your Honor.

23 **MR. GRAY:** The last thing, Your Honor, we prefer our  
24 version of 4.1. We understand the Court has ruled.

25 **THE COURT:** Okay. Thank you.

## CHARGING CONFERENCE

1                   **MR. KEKER:** Your Honor, before you leave --

2                   **THE COURT:** I'm not going anywhere.

3                   **MR. KEKER:** Okay. Good. Could we get some finality  
4 from the Government on how long --

5                   **THE COURT:** That's what I'm turning to now. That's  
6 the third thing I want to turn to is argument.

7                   **MR. KEKER:** And then also Juror No. 10, how you're  
8 going to handle that, we would like -- because the idea of  
9 starting and then starting over is not attractive.

10                  **THE COURT:** Well, here is -- here is -- that's a good  
11 question. Lets talk about that first.

12                  Obviously the Court has the power to order her to remain.  
13 I don't know that anybody wants that; is that correct?

14                  **MR. FRENTZEN:** No, Your Honor. The Government doesn't  
15 want that.

16                  **THE COURT:** And you don't want that?

17                  **MR. KEKER:** We don't want that.

18                  **THE COURT:** What I would propose to do -- and, again,  
19 it depends on the -- I propose to let her go if she still wants  
20 to go at the end of Tuesday or middle Tuesday or whenever we  
21 finish. That would be my proposal, provided that I have the  
22 alternate show up on Monday and Tuesday. I mean, I'll see  
23 that, but if suddenly there is a, you know -- yeah, right --  
24 epidemic, I'm going -- I won't feel guilty about telling her  
25 "I'm very sorry, but you have to remain" if she is going to

## CHARGING CONFERENCE

1 constitute the jury.

2                   So I would excuse her, and I think that's the answer to  
3 the question. Obviously I want her to listen to what happens  
4 on Monday, listen to what happens on Tuesday, but after that,  
5 she would go and I -- I would take whoever the next alternate  
6 is in line, put that person in, and I might or might not say  
7 something to the jury -- is that this juror has been excused  
8 for personal reasons, not make a big thing about it.

9                   Okay. So that answers that question.

10                  Now, turning to argument and asking Mr. Frentzen or who --  
11 who is speaking on behalf of the team here?

12                  You are, Mr. Reeves.

13                  **MR. REEVES:** I will be giving the Government's  
14 summation and Mr. Frentzen will be giving the rebuttal.

15                  **THE COURT:** Okay. Well, I'm actually not interested  
16 in who's doing what because I assume that you're all fungible.  
17 I'm interested in time. You know, time, time, time.

18                  So how are we on that one?

19                  **MR. REEVES:** I think about three hours for the  
20 Government's closing argument.

21                  **THE COURT:** Three hours. And that would include  
22 rebuttal and --

23                  **MR. REEVES:** No. I'm sorry. That does not include  
24 rebuttal. I would like to reserve about an hour to hour and a  
25 half for the rebuttal argument. So --

## CHARGING CONFERENCE

1                   **THE COURT:** By the way, "abouts" aren't going to work.

2                   **MR. REEVES:** Four and a half hours, Your Honor.

3                   **THE COURT:** Four and a half hours.

4                   **MR. KEKER:** Too much. That's ridiculous. I mean, I  
5 could live with four hours.

6                   **THE COURT:** Good. It is four hours. That's it. Four  
7 hours.

8                   I'll let you chop it up the way you want to chop it up,  
9 provided that you use at least two hours in your opening, so, I  
10 mean, I do not want a situation where -- and that won't happen  
11 anyway. You've got -- and I'm not asking you to divide it up  
12 now. Because I think that the hardest thing is to -- to say  
13 exactly what you're -- how long you're going to take. I mean,  
14 you'll take what you take in your opening.

15                  The rule is that you have to use at least two hours. If  
16 it ends up you use four hours in your opening, there is no  
17 rebuttal. So that's easy. So you know that. It has its  
18 consequences and so forth.

19                  If, again, as I say -- I mean, I really want to start --  
20 assuming I deny the Defense motions on the exhibits and so  
21 forth -- assuming the case is submitted under protest, as it  
22 is, on Monday morning, then the first thing is the Defense will  
23 get up, they'll rest, and I'll instruct the jury. I see no  
24 reason why I shouldn't do it first. That should take about a  
25 half an hour. That's until 9:30. And then we go into

## CHARGING CONFERENCE

1 argument. So the Government starts at 9:30 or thereabouts and  
2 goes for the length of time, and we may take a recess during it  
3 or not. But I would very much -- if -- I need to have some  
4 idea come 11:30 or noon as to how much more you have in your  
5 opening. Okay?

6 **MR. REEVES:** Can I --

7 **THE COURT:** And I'll either -- because I've got to be  
8 concerned about, you know, the welfare of the jury. I may take  
9 a lunch break at that time or not. And then you can address  
10 them after lunch when they'll all be asleep. Okay.

11 So -- and then -- and then the Defense will give their  
12 argument. They can give an argument up to four hours.

13 And the situation I will follow, I think, because I -- I  
14 promised the Defense that they will not have to conclude their  
15 argument that night and -- or that I wouldn't force the  
16 Defense, I think -- that's what I said -- I wouldn't force the  
17 Defense to conclude their argument that night -- is that if  
18 they want to reserve an argument for an hour, I think that's  
19 fair for the next day. That's Tuesday morning. They can argue  
20 Tuesday morning at 9:00 for an hour and the Government then can  
21 close, depending on how much they have left in their engine at  
22 that point.

23 I'm not going to say that the argument on Tuesday has to  
24 be of equal length because there is just no way to fine tune  
25 it, but I think it would be unfair to the defense not to let

## CHARGING CONFERENCE

1 them argue an argue on Tuesday.

2 **MR. KEKER:** Appreciate that, Your Honor. But we --

3 **THE COURT:** I think that's fair.

4 **MR. KEKER:** When the jury has heard two or  
5 two-and-a-half hours from the Government and we've gotten up  
6 and then talked to them for two hours and they have listened to  
7 four or five hours of argument in a day, we're going to ask  
8 that we recess after I've talked for two hours and come back  
9 and I'll talk for two hours or less and we'll -- the next day  
10 and there will be plenty of time for the Government to  
11 finish --

12 **THE COURT:** I don't know. I'm -- I don't know that I  
13 would give you two hours on Tuesday. I mean, I'll have -- I --

14 **MR. KEKER:** That's going to be the request. Because I  
15 think there is time before you have to leave -- if they're  
16 there from 9:00 to 1:00 --

17 **THE COURT:** Well, they have a couple of recesses.

18 **MR. KEKER:** I will take an hour and three quarters and  
19 then they can have a recess and they can have however much time  
20 they want for rebuttal.

21 The other part about rebuttal is I want to alert the  
22 Government through the Court that my understanding of opening  
23 is that they are supposed open and tell us all the theories and  
24 evidence that we have to rebut, and that if we start getting  
25 new theories or new ideas about why Mr. Hussain is liable in

## CHARGING CONFERENCE

1 the rebuttal, then that's what I call sandbagging, and I will  
2 be objecting to that and I will be objecting, if necessary, in  
3 front of the jury and I will be asking for time to deal with  
4 this new material because we're not going to get sandbagged in  
5 this case without protest.

6 **THE COURT:** Okay. Well, that's a position. The real  
7 question -- sandbagging, I think -- my understanding of  
8 sandbagging is that oh, look at all the evidence that they now  
9 say rebuts X. I don't think that's sandbagging. In other  
10 words, I think what sandbagging is is some new theory of -- of  
11 evidence that hasn't been presented in their opening and you  
12 haven't had a fair opportunity to address.

13 **MR. KEKER:** I agree.

14 **THE COURT:** But I don't think they have to say, "Here  
15 is all the evidence, A, B, C, D, and E." You give your  
16 argument, whatever that may be -- because you are not  
17 previewing your argument. You are not saying, "I'm going to  
18 say this and I'm going to say that." They say, "Oh, Mr. Keker  
19 said X, well, here is Y, which in the Government's view  
20 disapproves X, and Y, a series of evidence, a series of  
21 testimony" -- never been -- never been addressed by the  
22 Government in its -- in its opening. That is truly appropriate  
23 rebuttal. That's why there is rebuttal, actually, to be able  
24 to have the opportunity to address an argument that they've  
25 never heard.

## CHARGING CONFERENCE

1           So maybe you and I have different views of what rebuttal  
2 is. I think -- that's my view of rebuttal.

3           **MR. KEKER:** Very specifically in this case, what about  
4 transactions. If --

5           **THE COURT:** What if a transaction -- if a transaction  
6 disproves, in the Government's view, something you have said in  
7 your opening or your argument, they get to do it. They get to  
8 do it.

9           **MR. KEKER:** And without them saying in their opening  
10 what the -- their theory about the particular transaction is.  
11 One of the problems is this: We have, through Mr. Yelland,  
12 many transactions in his summary charts that the jury didn't  
13 hear a word about and -- and we -- and then we began to get  
14 through these -- the agent -- we began to get these new  
15 summaries that you let in about Poste Italiane -- so all I'm  
16 saying in their opening is they've got to say what is wrong,  
17 "we say this is a backdated transaction, we say this is" -- so  
18 that I can rebut that.

19           **THE COURT:** I would be with you if you had told them  
20 exactly what your argument is going to be. If you said that,  
21 "Look, I'm going to say and here it is, here are the  
22 transactions I'm going to point to and here it all is," telling  
23 them in advance, then I think you can make an argument that  
24 they should address that in their opening. But that's not  
25 the way it goes.

## CHARGING CONFERENCE

1                   **MR. KEKER:** I'm going to respond -- I'm going to talk  
2 about every transaction that they think they've proved is  
3 backdated. I will talk about each one of those and rebut it.  
4 If they don't mention it in the opening, they shouldn't be able  
5 to --

6                   **THE COURT:** I disagree with that. I think that  
7 they -- I'm not restricting argument. I'm not restricting  
8 argument on any side. You know, I'm not saying you make your  
9 argument, you say that this is what the evidence shows and they  
10 get up and say no, the evidence shows something else. They are  
11 entitled to do that. They're entitled to do that in light of  
12 the fact that -- that -- that your argument is not previewed  
13 in -- in a very concrete way.

14                   Of course -- and it shouldn't be. I've never heard of  
15 that. But that's the rationale, in the Court's view.

16                   **MR. REEVES:** Your Honor, one little detail. At least  
17 in the initial summation, I'm going to plan a break and have  
18 a -- you know, a point in time that makes sense --

19                   **THE COURT:** You do it as you want. I'm not telling  
20 people how to argue.

21                   Okay. Thank you.

22                   (Proceedings adjourned at 11:39 a.m.)

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3 CERTIFICATE OF REPORTER

4 I certify that the foregoing is a correct transcript  
5 from the record of proceedings in the above-entitled matter.

6

7 DATE: Thursday, April 19, 2018

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9 *Pamela A. Batalo*

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Pamela A. Batalo, CSR No. 3593, RMR, FCRR  
11 U.S. Court Reporter

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